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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

VALLEY BROADCASTING COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTION PRESENTED

Section 1304 of Title 18 of the United States Code prohibits the broadcasting of advertisements for casino gambling and other activities that "offer[] prizes dependent in whole or in part upon lot or chance." 18 U.S.C. 1304. The court of appeals held in this case that statutory exceptions to Section 1304 render the statute unconstitutional under *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), which was decided while the appeal was pending. The question presented is whether the court of appeals erred in invalidating Section 1304 without allowing the government to present evidence bearing on the constitutionality of the statute under *Coors*.

PARTIES TO THE PROCEEDING

Petitioners are the United States of America and the Federal Communications Commission, defendants-appellants below. Respondents are Valley Broadcasting Company and Sierra Broadcasting Company, plaintiffs-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America and the Federal Communications Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 107 F.3d 1328. The opinion of the district court (App., *infra*, 23a-40a) is reported at 820 F. Supp. 519.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1997. A petition for rehearing was denied on August 25, 1997. App., *infra*, 21a-22a. On November 14, 1997, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 23, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1304 of Title 18, United States Code, provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

2. Section 1307(a) of Title 18, United States Code, provides:

> The provisions of sections 1301, 1302, 1303, and 1304 [of Title 18] shall not apply to —
>
> (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—
>
> (A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

3. Section 2720 of Title 25, United States Code, provides:

Consistent with the requirements of [the Indian Gaming Regulatory Act (IGRA)], sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to [IGRA].

STATEMENT

1. a. Section 1304 of Title 18 of the United States Code prohibits television and radio stations licensed by the Federal Communications Commission (FCC) from broadcasting advertisements for "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." Section 1304 is part of a long-standing body of federal restrictions on interstate commerce involving gam-

bling activities. 18 U.S.C. 1084, 1301-1307; 39 U.S.C. 3001, 3005; see *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421-423 (1993). The prohibition now codified in Section 1304 was enacted in 1934 to supplement previously enacted restrictions on the distribution of lottery advertising and paraphernalia through the mails and other forms of interstate transportation. See 18 U.S.C. 1301 (interstate transportation), 1302 (mail); 39 U.S.C. 3001(a), 3005 (mail).

By its terms, Section 1304 applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954), this Court construed that language to encompass any undertaking involving "(1) the distribution of prizes; (2) according to chance; (3) for a consideration." *Id.* at 290. That formulation encompasses the kinds of gambling activities that take place in casinos, and Section 1304 has therefore been understood to apply to casino gambling as well as to "lotteries" in the more traditional sense.

b. Since the enactment of Section 1304, Congress has added several exceptions to the statute. In 1976, Congress adopted a partial exception for lotteries conducted by a State, which allows the broadcasting of advertisements for state lotteries in States that conduct them but continues to prohibit advertisements in States that do not conduct lotteries. 18 U.S.C. 1307(a)(1). This Court sustained the constitutionality of the state lottery provision under the First Amendment in *Edge Broadcasting*, *supra*.

In 1988, Congress adopted additional exceptions for Indian gambling, charitable gambling, and government-conducted gambling other than state

lotteries. 18 U.S.C. 1307(a)(2)(A); 25 U.S.C. 2720.[1] In enacting those exceptions, Congress considered but specifically rejected proposals to allow broadcast advertising for casino gambling. See 134 Cong. Rec. 12,278-12,282 (1988) (House); *id.* at 31,073-31,076 (Senate).[2]

As discussed below, the decision of the court of appeals in this case attached particular significance to the statutory exception for Indian gambling. See App., *infra*, 15a, 19a. Like state governments, Indian tribes have come to rely on gambling as a source of public revenue. See 25 U.S.C. 2701(1); S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." *Id.* at 12. To accommodate the governmental interests of the nation's Indian tribes, while simultaneously responding to concerns about potential

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[1] Congress has also adopted exceptions for advertising of certain promotional activities that involve the distribution of prizes (*e.g.*, an auto dealership's car raffle) and fishing contests not conducted for profit. See 18 U.S.C. 1305, 1307(a)(2)(B).

[2] As originally proposed, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307), would have removed advertising restrictions on all lotteries allowed under state law, including commercial casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). The House of Representatives, however, adopted an amendment that specifically excluded casino gambling from the bill, over the objections of representatives from Nevada and New Jersey. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee emphasized that "no provision of [the bill] is intended to change current law as it applies to interstate advertising of professional gambling activities." *Id.* at 31,075.

criminal infiltration and other problems, Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. 2701 *et seq.*). See *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1119-1120 (1996).

As part of Congress's effort to "promot[e] tribal economic development," 25 U.S.C. 2702(1), IGRA exempts from Section 1304 "any gaming conducted by an Indian tribe pursuant to [IGRA]." 25 U.S.C. 2720. At the same time, the Act substantially tightens government oversight of Indian gambling, by subjecting certain types of gambling to direct federal regulation and subjecting other types of gambling to regulatory compacts between Indian tribes and States. 25 U.S.C. 2704-2706, 2710-2712. In addition, the Act mandates that the net revenues of Indian gambling be used solely for public purposes. 25 U.S.C. 2710(b)(2)(B), (d)(1)(A)(ii), and (d)(2)(A).

2. a. Respondents are Nevada television stations that wish to broadcast advertisements for Nevada casino gambling. They filed this suit against the United States and the FCC in 1992 to challenge the constitutionality of Section 1304.[3] Respondents claimed that, with respect to broadcast advertisements for legal casino gambling, Section 1304 violates the First Amendment under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, the constitutionality of a government restriction on commercial speech turns on: (1) whether the provision restricts truthful speech about lawful commercial activities;

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[3] Respondents also challenged the constitutionality of an FCC regulation that incorporates the terms of Section 1304. See 47 C.F.R. 73.1211.

(2) whether "the asserted governmental interest [for the provision] is substantial"; (3) whether the provision "directly advances" the asserted interest; and (4) whether the provision is "more extensive than is necessary to serve that interest." *Id.* at 566.

The government defended the constitutionality of Section 1304 on the basis of two governmental interests: first, an interest in assisting States that restrict or prohibit gambling, and, second, an independent federal interest in minimizing the social costs traditionally associated with gambling activities. The government contended that Section 1304 directly advances both of those interests by reducing public demand for gambling and by shielding non-gambling States from gambling advertisements broadcast in adjacent States.

Respondents argued, *inter alia*, that the statutory exceptions to Section 1304 (see pp. 4-6, *supra*) preclude it from "directly advancing" the government's interests. In response, the government looked to this Court's decision in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). In *Posadas*, this Court held that a law prohibiting casino gambling advertising in Puerto Rico directly advanced the legislature's interests despite the fact that the legislature permitted other kinds of gambling to be advertised. The Court reasoned that, "whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." *Id.* at 342. The Court sustained the constitutionality of the statute without requiring evidence of the actual scope or impact of advertising for other forms of gambling. See *id.* at 341-344.

The government contended in this case that the statutory exceptions to Section 1304 are without constitutional significance for the same reasons as the exceptions in *Posadas*: eliminating broadcast advertisements for casino gambling directly advances the government's interests, regardless of whether advertising for other kinds of gambling is permitted, and the government has a particular interest in reducing demand for casino gambling. In light of *Posadas*, the government did not present evidence regarding the actual operation and effect of the statutory exceptions to Section 1304.

b. In April 1993, the district court entered summary judgment in favor of respondents. The district court held that the government's only legitimate interest under Section 1304 was that of "protect[ing] state choice," an interest that the government itself had never relied on, and that Section 1304 was not adequately tailored to that supposed interest. App., *infra*, 34a-38a.

The government appealed the district court's decision to the Ninth Circuit in June 1993. Thereafter, the case remained pending on appeal for nearly four years.[4] During the time that the appeal was pending, this Court issued intervening decisions in a number of commercial speech cases. See *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996); *Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618 (1995); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez* v. *Florida Dep't of Business & Professional Regulation*, 512

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[4] The appeal was argued in February 1995. Shortly thereafter, one of the original members of the Ninth Circuit panel died and was replaced by another member of the court. See App., *infra*, 1a n.*.

U.S. 136 (1994); *Edge Broadcasting, supra*; *Edenfield* v. *Fane*, 507 U.S. 761 (1993).

For present purposes, the most significant of those intervening decisions is *Coors*. *Coors* addressed a First Amendment challenge to a federal statute prohibiting the disclosure of alcohol content information on beer labels. The government asserted that the labeling restriction furthered the public interest in preventing industry "strength wars." 514 U.S. at 483-484. The Court agreed that the interest in preventing strength wars was substantial, but held that the statute did not "directly advance" that interest as required by *Central Hudson*, because other provisions of the law "directly undermine and counteract its effects." *Id.* at 489. The Court pointed out that Congress had permitted brewers to disclose alcohol content information through direct promotional advertising in most of the country and that Congress had imposed no restrictions on alcohol content labeling for hard liquor and wine. *Id.* at 488-489. The Court concluded that those "exemptions and inconsistencies" precluded the labeling ban from achieving its goal. *Id.* at 489. Relying on *Edenfield, supra*, which was decided shortly after the district court decision in this case, the Court held that the government had failed to "carr[y] the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.'" *Id.* at 487 (quoting *Edenfield*, 507 U.S. at 767).

c. In February 1997, the Ninth Circuit affirmed the judgment of the district court in this case. App., *infra*, 1a-20a. Unlike the district court, the court of appeals held that the government's interests in assisting non-gambling States and discouraging public participation in gambling activities are substan-

tial. *Id.* at 8a-12a. However, the court of appeals held that Section 1304 does not directly advance those interests and therefore fails the third step in the *Central Hudson* inquiry. *Id.* at 13a-20a. In light of that holding, the court found it unnecessary to reach the fourth step. *Id.* at 20a n.9.

The holding of the court of appeals regarding the direct advancement requirement of *Central Hudson* rested chiefly on this Court's intervening decision in *Coors*. In light of *Coors*, the court concluded that the statutory exceptions to Section 1304, particularly the exception for Indian gambling, prevent Section 1304 from "materially * * * discourag[ing] public participation in commercial lotteries." App., *infra*, 16a. The court also concluded that the Indian gambling exception "would appear to undermine the government's purported interest in protecting non-casino states from the reach of casino advertisements on the airwaves." *Id.* at 19a.

The court of appeals acknowledged that "[i]t may be that such advertising is limited in scope * * * and thus does *not* interfere with the government's interest in protecting [non-casino] states." App., *infra*, 19a (emphasis added). Rather than remanding for presentation of evidence on that issue, however, the court instead struck down the statute. The court reasoned that it need not explore further the actual effect of the statutory exceptions because "the government has failed to provide any evidence" on the issue. *Ibid.*

d. The government filed a petition for rehearing and suggestion of rehearing *en banc*. The government argued, *inter alia*, that the court of appeals should remand the case for evidentiary proceedings relating to the statutory exceptions to Section 1304.

The government explained that it had not presented evidence regarding the operation and scope of the statutory exceptions because precedents such as *Posadas* had made the presentation of such evidence unnecessary at the time of the district court proceedings. The government pointed out that the cases on which the court of appeals relied were not decided until after the completion of the district court proceedings—in the case of *Coors*, more than two years afterward. The court of appeals denied the government's petition without opinion. App., *infra*, 21a-22a.[5]

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[5] The constitutionality of Section 1304's prohibition against the advertising of lawful casino gambling is also at issue in two other cases currently in the federal courts. The Fifth Circuit is considering the constitutionality of the statute in *Greater New Orleans Broadcasting Ass'n* v. *United States*, No. 94-30732, which was previously remanded by this Court in light of *44 Liquormart, supra*. See 117 S. Ct. 39 (1996). The second pending case is *Players International, Inc.* v. *United States*, No. 96-4911 (D.N.J. Dec. 16, 1997). In *Players*, the government presented substantial evidence in support of the constitutionality of Section 1304. Nonetheless, on December 15, 1997, the district court issued an opinion holding the statute unconstitutional. The court found that the government's twin interests in assisting States that restrict or prohibit gambling and in minimizing the social costs traditionally associated with gambling are substantial, see slip op. 8-16, but the court concluded that Section 1304 cannot survive scrutiny under the third and fourth steps in the *Central Hudson* analysis, see slip op. 16-22. Therefore, on December 16, 1997, the district court issued an order granting summary judgment for the plaintiffs and declaring that Section 1304 unconstitutionally infringes on their First Amendment rights. The government is currently reviewing the district court's decision in order to determine whether to appeal.

REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit in this case disregards basic principles of constitutional adjudication. The court of appeals invalidated an Act of Congress based on a record that was not adequate to resolve the constitutional issues decided by the court, given the court's interpretation of the governing precedents. Moreover, the constitutional precedents on which the court relied in invalidating the statute were not decided until after the completion of the district court proceedings in this case. The court of appeals nonetheless denied the government the opportunity to introduce evidence in response to those intervening precedents, which the court of appeals read as imposing a new evidentiary burden on the government.

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994) (*Turner I*), and similar decisions make clear that, when a court finds that the constitutionality of an Act of Congress turns on factual questions that are not adequately illuminated by the existing record, the court should not resolve the constitutionality of the statute, but should instead remand for development of a sufficient record. Because the court of appeals acted prematurely in deciding the constitutionality of 18 U.S.C. 1304, the government does not ask this Court to take up the underlying constitutional issue at this time. Instead, the Court should vacate the Ninth Circuit's decision and remand the case for further evidentiary proceedings before the district court. Those proceedings may enable the Ninth Circuit to uphold the statute and thus obviate

the need for this Court to address the constitutional question at issue in this case.[6]

1. When a court is presented with a challenge to the constitutionality of a federal statute, the constitutional issues before the court often are purely legal ones that can be resolved without reference to an extensive evidentiary record. In some instances, however, the legal standards governing particular constitutional claims make it necessary for the court to address factual issues relating to the scope or operation of the statute. For a variety of reasons, the court may find that the record before it does not cast sufficient light on the factual issues surrounding the constitutional claim. That problem is particularly likely to present itself on appeal, when the reviewing court may take a different view of the governing legal standards than the trial court took and is faced with a pre-existing record rather than one that is still being developed.

a. This Court's recent decision in *Turner I*, *supra*, illustrates the appropriate response of an appellate court when it finds the record is inadequate to resolve a constitutional challenge to a federal statute. In *Turner I*, this Court was presented with a First Amendment challenge to the "must-carry" provisions of the Cable Television Consumer Protection and

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[6] Of course, should the Court determine that the record has been developed sufficiently for the Court to decide the underlying constitutional issue in this case, the government is prepared to defend the constitutionality of Section 1304. As indicated *infra*, however, we believe the better course is to remand for additional fact-finding and further consideration of the issues on the basis of a more appropriate record by the district court, and, if necessary, the court of appeals and, perhaps ultimately this Court.

Competition Act of 1992. Borrowing from the Court's formulation of the "direct advancement" inquiry in *Edenfield* v. *Fane*, 507 U.S. 761 (1993), a plurality of the Court in *Turner I* held that the government had the burden of showing that "the recited harms [underlying the must-carry provisions] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." 512 U.S. at 664 (opinion of Kennedy, J.) (citing *Edenfield*, 507 U.S. at 770-771). The plurality then examined the record and determined that it was not sufficient to satisfy the government's burden regarding the efficacy of the must-carry provisions. *Id.* at 665-668.

Having found the existing record inadequate to sustain the constitutionality of the must-carry provisions, the plurality did not invalidate the statute. Instead, "[b]ecause of the unresolved factual questions, the importance of the issues * * * , and the conflicting conclusions that the parties contend are to be drawn from [the existing record]," the Court deemed it "necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, *before* passing upon the constitutional validity of the challenged provisions." 512 U.S. at 668 (opinion of Kennedy, J.) (emphasis added); *id.* at 669-674 (Stevens, J., concurring in part and concurring in the judgment). The Court therefore remanded for further evidentiary proceedings. *Ibid.*

Following the completion of the proceedings on remand, the case was again appealed to this Court. On appeal, the Court held that the record presented on remand was sufficient to sustain the constitutionality of the must-carry provisions. *Turner Broadcasting*

System, Inc. v. *FCC*, 117 S. Ct. 1174, 1189-1203 (1997) (*Turner II*). The remand in *Turner I* thus led to the eventual vindication of a statute the constitutionality of which was not adequately demonstrated by the original record.

The Court took the same approach to an inadequate constitutional record in *Askew* v. *Hargrave*, 401 U.S. 476 (1971) (per curiam). In *Askew*, the Court vacated and remanded a three-judge district court decision holding that a Florida education tax statute violated the Equal Protection Clause. In addition to remanding for consideration of *Pullman* abstention,[7] see *id.* at 478, the Court directed the district court to reopen the record to permit Florida to introduce evidence bearing on the equal protection claim:

> [T]he pleadings and the [plaintiffs'] affidavit * * * are inadequate as a basis for deciding the equal protection claim. They do not sufficiently present the facts related to [Florida's] argument that the [challenged law] was only one aspect of a comprehensive legislative program for reorganizing educational financing throughout the State to more nearly equalize educational opportunities for all the school children of the State. * * * *Since the manner in which the program operates may be critical in the decision of the [constitutional] claim, that claim should not be decided without fully developing the factual record at a hearing.*

Id. at 478-479 (emphasis added).

The Court also followed the principle against adjudication of a constitutional issue based on an inade-

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[7] See *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941).

quate record in *Storer* v. *Brown*, 415 U.S. 724 (1974). In *Storer*, a three-judge district court had upheld against a First and Fourteenth Amendment challenge a California statute imposing certain signature requirements on persons desiring to stand for election as independent candidates for President and Vice President. *Id.* at 727. In order to qualify for inclusion on the ballot as an independent, an aspiring candidate was required to file a petition signed by voters numbering no fewer than five percent of the total votes cast in California in the last general election. *Id.* at 727, 738. The signatures had to be gathered within a 24-day period between the primary and the general elections, and signatures from individuals who voted in the primary elections could not count toward the required number. *Id.* at 727, 739. The Court found it "necessary to know other critical facts which do not appear from the evidentiary record" before it could pass on the constitutionality of the statute. *Id.* at 738. The Court "was quite sure, therefore, that further proceedings should be had in the District Court to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President under California law." *Id.* at 740. The Court therefore remanded without passing on the constitutionality of the California law. *Id.* at 746.

b. In declining to resolve constitutional challenges to legislation until after the development of an adequate record, decisions such as *Turner I*, *Askew*, and *Storer* reflect more general principles of constitutional adjudication. This Court has repeatedly emphasized that federal courts are obligated to avoid passing prematurely on constitutional questions. See, *e.g.*, *Clinton* v. *Jones*, 117 S. Ct. 1636, 1642 n.11

(1997); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 756 n.8 (1976); *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961); *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-571 (1947); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring). Fidelity to that principle means, among other things, that, "before * * * questions of constitutional law, both novel and of far reaching importance, [are] passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'" *Borden's Farm Prods. Co.* v. *Baldwin*, 293 U.S. 194, 212 (1934) (quoting *City of Hammond* v. *Schappi Bus Line, Inc.*, 275 U.S. 164, 171-172 (1927) (Brandeis, J.)); *Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938) (citing "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions"). See also *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 574-575 (1949) (Frankfurter, J., dissenting) (giving examples of cases "remanded [by the Court] to avoid constitutional adjudication without adequate knowledge of the relevant facts").[8]

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[8] The principle that appellate courts should not decide constitutional questions until trial courts have adequately developed the facts required for a decision parallels the principle under which this Court has declined to decide constitutional issues until state courts have clarified relevant provisions of state law. See, *e.g.*, *Rescue Army*, 331 U.S. at 575-585 (declining to exercise jurisdiction over appeal of denial of writ of prohibition in order to permit development of the facts and interpretation of state law in a state court trial); *Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945); *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

The duty to avoid premature resolution of constitutional questions is particularly acute when the constitutionality of a federal statute is called into question. "Judging the constitutionality of an Act of Congress is properly considered the 'gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). See also *Raines*, 362 U.S. at 20.[9] While the invalidation of a federal law "is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). When a court passes on the constitutionality of a federal law without a record that adequately illuminates the constitutional issues before the court, it risks invalidating a statute that a more sufficient record would show to be within the constitutional authority of the political branches. In so doing, the court thereby exceeds the proper bounds of "the role assigned to the

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[9] As one eminent scholar of constitutional law has stated, "[i]t must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Thomas M. Cooley, *Constitutional Limitations* 332 (8th ed. 1927).

judiciary in a tripartite allocation of power." *Id.* at 474 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)).[10]

c. Resolving a constitutional challenge on the basis of an inadequate record is particularly inappropriate when the constitutional standards that govern the case have changed after the completion of the evidentiary proceedings. It is a fundamental principle that litigants "[should] not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). When intervening decisions attach legal significance to previously insignificant factual issues, the only way that principle can be vindicated is to allow further presentation of evidence in response to the new precedents. See, *e.g.*, *Jones* v. *City of Lubbock*, 640 F.2d 777, 777-778 (1981) (Goldberg, J., concurring) ("[D]ue process and precedent mandate that when the rules of the game are changed [by intervening Supreme Court decisions], the players must be afforded a full and fair opportunity to play by the new regulations" by "present[ing] further evidence on remand"), opinion supplemented on reh'g, 682 F.2d 504 (5th Cir. 1982); *Kirksey* v. *City of Jackson*, 625 F.2d 21 (5th Cir. 1980); *Shead* v.

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[10] As Justice Powell noted in *United States* v. *Richardson*, 418 U.S. 166 (1974), "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if [the courts] do not exercise self-restraint in the utilization of [their] power to negative the actions of the other branches." *Id.* at 188 (Powell, J., concurring).

Quatso, 486 F.2d 694 (7th Cir. 1973); *Williams* v. *United States*, 282 F.2d 940 (6th Cir. 1960).

2. a. The Ninth Circuit's disposition of the government's appeal in this case is fundamentally at odds with this Court's decisions in *Turner I*, *Askew*, and *Storer* and with the principles of constitutional adjudication that underlie those decisions. In reliance upon this Court's intervening decision in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), the court of appeals ruled that the constitutionality of Section 1304 turns on the scope and effect of the statute's exceptions, particularly the exception for Indian gambling. The record presented to the district court, however, simply did not address that issue. The record contains no evidence regarding the volume of gambling activities covered by the statutory exceptions or the amount and extent of broadcast advertising that those exceptions permit. The court of appeals therefore did not have a sufficient record to determine that, in practice, the statutory exceptions prevent Section 1304 from "directly advancing" the government's asserted interests. Given the Ninth Circuit's reading of *Coors*, "the manner in which the [statute] operates may be critical to the decision of the [constitutional] claim." *Askew*, 401 U.S. at 479. It therefore was improper for the court of appeals to strike down the statute "without fully developing the factual record at a hearing." *Ibid.*

The Ninth Circuit's error is particularly evident when the constitutional issue before the court of appeals in this case is compared to the constitutional issue before this Court in *Turner I*. Although the cases involve distinct First Amendment claims, the claims in both cases involve essentially the same underlying inquiry: whether the government has

"demonstrate[d] that * * * the regulation will in fact alleviate the[] [asserted] harms in a direct and material way." *Turner I*, 512 U.S. at 664 (opinion of Kennedy, J.); App., *infra*, 19a-20a. Indeed, the plurality in *Turner I* framed the constitutional inquiry there by employing the "direct advancement" test formulated in *Edenfield*, the commercial speech decision that underlies *Coors*. Faced with a record that was found insufficient to resolve that inquiry, this Court in *Turner I* returned the litigation to the district court for additional evidentiary proceedings. Faced with a record that was likewise insufficient to resolve the same inquiry, the court of appeals in this case chose to strike down the challenged statute instead.

b. The Ninth Circuit's failure to remand was particularly inappropriate because the court of appeals invalidated Section 1304 based on case law that had not been decided when the government was building its record in this case. The government was thus unfairly "surprised on appeal" because it had "no opportunity to introduce evidence" to meet the burden imposed by the court of appeals. See *Wulff*, 428 U.S. at 120. The Ninth Circuit therefore improperly penalized the government for "fail[ing] to provide any evidence" regarding the operation of the statutory exceptions (App., *infra*, 19a)—and on that basis proceeded improvidently to invalidate an Act of Congress. As indicated above, at the time that the district court record was developed in 1992, the government had no reason to think that an evidentiary showing regarding the statutory exceptions would be required. This Court had sustained the constitutionality of a similar restriction on gambling advertising in *Posadas*, and, in so doing, the Court had dismissed

the significance of comparable statutory exceptions without any evidentiary inquiry. See 478 U.S. at 341-344. More generally, *Posadas* had adopted a position of judicial deference toward the legislative judgments underlying commercial speech legislation. See *ibid.*

During the extended pendency of the appeal in this case, this Court's intervening commercial speech decisions departed from *Posadas* in significant respects. "Since *Posadas*, * * * this Court has examined more searchingly the [government's] professed goal, and the speech restriction put into place to further it, before accepting a * * * claim that the speech restriction satisfies First Amendment scrutiny." *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment); see also *id.* at 1511-1513 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.). The Court's decision in *Coors*, which provided the principal basis for the Ninth Circuit's decision in this case, is one of the intervening decisions that reflect the "closer look" (*id.* at 1522) (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment) now required for commercial speech restrictions.[11] At the time that the government presented its evidence to the district court in this case, however, *Coors* lay more than two years in the

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[11] In making this observation, we do not concede that *Coors* is as far-reaching as the court of appeals regarded it to be. At this point in the litigation, however, it is unnecessary, and would be inappropriate, to pursue the Ninth Circuit's reading of *Coors* further. A remand is in order whether or not the Ninth Circuit's reading is correct, because the evidence adduced on remand may make any dispute over the breadth of *Coors* immaterial and thus eliminate the need for this Court to address the constitutional issue raised by the scope of *Coors*.

future.[12] Indeed, *Coors* was not decided until after the government's appeal in this case was taken under submission by the court of appeals. The government thus did not err in failing to present evidence to the district court in response to a case that had yet to be decided. Rather, the court of appeals erred in failing to allow the government to present evidence to the district court once the case had been decided and the court of appeals had made clear its belief that the case had altered the law.

c. That error led the court of appeals to utilize "a tool of last resort" and invalidate the action of a "co-equal branch[] of the Federal Government," *Valley Forge*, 454 U.S. at 474, even though there is a good chance that a more adequate record would show the statute to be within Congress's constitutional authority. The statutory exceptions to Section 1304 (see pp. 4-6, *supra*) involve activities that reasonably can be expected to have a less pervasive adverse impact than commercial casino gambling. In 1996, commercial casinos accounted for more than 40 percent ($19.1 billion) of the total gross gambling revenues in the United States. E.M. Christiansen, *The United States 1996 Gross Annual Wager*, International Gaming & Wagering Business, Aug. 1997, at 28, 32. In contrast, Indian gambling, the principal object of the Ninth Circuit's concern, accounted for approximately 11 percent of total gross gambling revenues ($5.3 billion). *Ibid.* Given the disparity between the volume of Indian gambling and the volume of commercial

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[12] As noted above, *Coors* relied primarily on the Court's earlier commercial speech decision in *Edenfield*. See *Coors*, 514 U.S. at 486-487. Like *Coors* itself, *Edenfield* was decided after the completion of the district court proceedings in this case.

casino gambling, there is good reason to believe that an evidentiary remand might well refute rather than confirm the Ninth Circuit's assumption that the Indian gambling exception defeats the purposes of Section 1304.

Because the Ninth Circuit acted improvidently in resolving the constitutionality of Section 1304 on the basis of a record that had become inadequate for that purpose, this Court need not reach the underlying First Amendment issues at this time—and indeed would likely find the record similarly inadequate for that purpose. Instead, the Court should vacate the judgment of the court of appeals and remand the case for further evidentiary proceedings. Because that course is so clearly appropriate under the governing decisions of this Court that we have discussed, the Court may wish to consider summary disposition of the case for that purpose.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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DECEMBER 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16191

D.C. No. CV-92-00400-PMP

VALLEY BROADCASTING COMPANY, DBA KVBC (TV), CHANNEL 13, LAS VEGAS, NEVADA, AND SIERRA BROADCASTING COMPANY, DBA KRNV (TV), CHANNEL 4, RENO, NEVADA, PLAINTIFFS

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS-APPELLANTS

Argued and Submitted Feb. 15, 1995
Filed: Feb. 25, 1997

OPINION

Before: BRUNETTI* and O'SCANNLAIN, Circuit Judges; MERHIGE,** District Judge.

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* Pursuant to General Order 3.2.g, Judge Brunetti was drawn to replace Judge Tang, who died on July 18, 1995. Judge Brunetti has listened to the tape recording of oral argument and has read the briefs.

** The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

O'SCANNLAIN, Circuit Judge:

We must determine whether regulations which criminalize the broadcast of advertisements for casino gambling are consistent with the First Amendment.

I

Commercial lotteries and the advertising thereof have long been the subjects of state and federal regulation. Indeed, as early as 1827, Congress provided that "no postmaster, or assistant postmaster, shall act as agent for lottery offices." Act of Mar. 2, 1827, § 6, 4 Stat. 238. By 1868, Congress had made it unlawful "to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind or any pretext whatsoever." Act of July 27, 1868, § 13, 15 Stat. 196. In 1890, Congress extended its mailing ban from letters and circulars to newspapers. Anti-Lottery Act of 1890, § 1, 26 Stat. 465; *see also Ex Parte Rapier*, 143 U.S. 110 (1892) (upholding 1890 Act against First Amendment challenge). And in 1895, Congress eliminated interstate lotteries altogether by prohibiting the transportation of lottery tickets in interstate commerce. Act of Mar. 2, 1895, § 1, 28 Stat. 963; *see also Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903) (upholding constitutionality of 1895 Act against challenge that it exceeded Congress' power under commerce clause).

Consistent with this regulatory tradition, Congress in 1934 enacted legislation criminalizing the broadcast advertisement of commercial lotteries. Communications Act of 1934, 48 Stat. 1064, 1088. This legislation is the predecessor of the statute at issue

here, 18 U.S.C. § 1304. In the years following the enactment of section 1304, Congress has amended the federal anti-lottery statutes on several occasions; however, Congress has chosen not to lift the ban on the broadcast advertisement of private casino gambling.

It is precisely this restriction which troubles our litigants. Valley Broadcasting Company and Sierra Broadcasting Company ("the Broadcasters") are Nevada corporations which own and operate television stations in Las Vegas and Reno, Nevada, respectively. The bulk of the Broadcasters' audience is located in Nevada; however, 4% (13,200/302,200) of all households receiving Valley Broadcasting signals reside in Utah, and 19% (37,200/197,200) of all households receiving Sierra Broadcasting signals reside in California. The Broadcasters desire to broadcast advertisements for casino gambling, an activity that is legal in the State of Nevada. The Broadcasters have declined to accept such advertising for fear of prosecution under 18 U.S.C. § 1304 and its implementing regulation, 47 C.F.R. § 73.1211.[1]

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[1] 18 U.S.C. § 1304 provides, in relevant part, that:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The language of 47 C.F.R. § 73.1211(a) is substantially identical. For this reason, the balance of this opinion will refer only to § 1304.

On May 14, 1992, the Broadcasters brought suit against the United States and the Federal Communications Commission (collectively "the government"), seeking declaratory and injunctive relief. Among other claims, the Broadcasters contended that 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211 violate the First Amendment of the United States Constitution.[2] The government disagreed.

The district court agreed with the Broadcasters and struck down the regulations as unconstitutional. The government appeals.

II

We begin our endeavor by remarking upon the unique protections afforded that speech which is commonly designated "commercial." It is without doubt that "[t]he First Amendment . . . protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) (rejecting "the 'highly paternalistic' view that gov-

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[2] Because the federal government is, at present, not prosecuting the Broadcasters under the challenged regulations, standing will exist only if the Broadcasters can demonstrate a "reasonable threat of prosecution for conduct allegedly protected by the Constitution." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 n. 1 (1986). The district court concluded that the Broadcasters had standing to adjudicate this case. We agree.

The Broadcasters have alleged the nature and content of the of the advertisements they wish to broadcast. The Federal Communications Commission, which actively enforces the challenged regulations, has historically found similar advertisements in violation of these provisions. Accordingly, the Broadcasters have demonstrated a "reasonable threat of prosecution" and thus have standing to assert their challenge.

ernment has complete power to suppress or regulate commercial speech"). That said, we note that such protection is less than that afforded other constitutionally protected expression. *See id.* at 563. Accordingly, restrictions that might be inconsistent with the First Amendment's protection of other varieties of speech are tolerated in the area of commercial speech.

In *Central Hudson*, the Supreme Court articulated a four-part test under which to analyze the constitutionality of government regulations limiting commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.[3]

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[3] The Broadcasters claim in passing that § 1304 is a content-based regulation of speech. Thus, they contend, under the standard set forth in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), § 1304 must be subject to strict scrutiny.

Although *R.A.V.* requires that the content-based regulation of proscribable classes of speech be subject to strict review, it is unclear whether *R.A.V.*'s holding extends to commercial speech. Despite a suggestion in *R.A.V.* that strict scrutiny indeed does apply to the content-based regulation of commercial speech, *see id.* at 388-89 (suggesting that state regula-

The parties agree that the advertising at issue is neither illegal nor misleading. Rather, their dispute centers around the remaining three prongs of *Central Hudson*. We treat each prong in turn.

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tion of price advertising would fall within parameters of *R.A.V.* in certain contexts), the Supreme Court has continued to apply *Central Hudson* in the commercial speech context in cases following *R.A.V.* *See United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993) (applying *Central Hudson* to First Amendment challenge to 18 U.S.C. § 1307). Several courts have, however, either applied or considered the potential application of *R.A.V.* to regulations restricting commercial speech. *See MD II Entertainment Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir.1994) (recognizing potential application of *R.A.V.* in commercial speech context); *Hornell Brewing Co. v. Brady*, 819 F.Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *Central Hudson* and *R.A.V.* without deciding which is required); *Citizens United for Free Speech II v. Long Beach Township Bd. of Comm'rs*, 802 F.Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's recent decision in *R.A.V. v. St. Paul*, that commercial speech must be protected by the usual strictures against content-based distinctions.").

Although the applicability of *R.A.V.* in the commercial speech context poses a question of interest, we need not resolve it. Even were we to conclude that *R.A.V.* applied, we are persuaded that § 1304 would nonetheless fall outside its scope. As *R.A.V.* makes clear, a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular secondary effects of the speech, so that the regulation is justified without reference to the content of the . . . speech." *Id.* (quotation omitted). Here, the government justifies § 1304 by reference to the social ills uniquely attendant to casino gambling, and not by the content of the speech itself. *See Citizens United*, 802 F.Supp. at 1233 (recognizing secondary effects exception to *R.A.V.* in commercial speech context, but concluding that defendants had not presented sufficient evidence of such).

A

The government asserts two interests. First, the government contends, it has an interest in reducing public participation in commercial lotteries. Second, the government claims, it has a substantial interest in protecting those states that choose not to permit casino gambling within their borders.

With regard to its first interest, the government explains that "[s]ection 1304 serves an independent federal interest in discouraging public participation in commercial lotteries, including casino gambling, and thereby minimizing the wide variety of social ills that have historically been associated with these forms of gambling." The district court rejected this interest outright, concluding that the government had presented no specific evidence to support its claim that modern day lotteries are the vehicles of social ills.

The district court was correct in its premise. The government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real. . . ." *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993); *see also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648 (1984) (rejecting State's asserted interest in ban on illustrations in advertising by attorneys because "[t]he State's arguments amount to little more than unsupported assertions; nowhere does the State cite any evidence or authority of any kind for its contention . . ."). This requirement does not, however, rise to the level of strict scrutiny; we have expressly held that "the asserted governmental interest must be

'substantial,' rather than 'compelling.'" *Association of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729 (9th Cir.1994), *cert. denied*, 116 S. Ct. 62 (1995) (applying the "'more relaxed inquiry'" of intermediate scrutiny to restrictions on commercial speech).

Applying these principles, we are persuaded that the harms sought to be avoided are real. The government included in its pretrial papers excerpts from a 1984 hearing before the President's Commission on Organized Crime. These excerpts address, in part, "the attraction of traditional organized crime groups to licensed casinos." *Organized Crime and Gambling: Hearings Before the President's Commission on Organized Crime*, at vii (June 1985). Although it is true that the scope of the government's submissions is not extensive, and although portions of the proffered hearings suggest that "the threat of organized crime control has diminished considerably," *id.* at 22, the report when read in its entirety indicates that a link exists between casino gambling and organized crime. *See id.* at 617 (noting connection between casino employees and organized crime); *id.* at 622 (noting "substantial organized crime involvement" in the junket industry); *id.* at 801-03 (discussing methods employed by organized crime to "skim" money from casino gambling operations); *id.* at 805-12 ("Increasingly, organized crime has used casinos like private banks to launder the proceeds of narcotics trafficking."); *id.* at 515-17 (testimony of member of organized crime family regarding Chicago crime family's control of Las Vegas casinos); *id.* at 528-31 (discussing money laundering schemes employed in private casinos).

Further supporting the government's interest is the fact that the Supreme Court, in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), recognized as substantial an interest very similar to that asserted by the government here. The *Posadas* Court rejected a First Amendment challenge to legislation enacted by Puerto Rico which prohibited the advertisement of casino gambling aimed at residents of the Commonwealth. Puerto Rico asserted as its interest a desire to reduce the demand for casino gambling among its residents; specifically, the legislature was concerned that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety, and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." *Id.* at 341 (quotation omitted). The Supreme Court had "no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' government interest." *Id.*; *see also United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696, 2703 (1993) (recognizing gambling as a "vice"); *cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (city has substantial interest in "preserving the quality of life in the community at large"), *cert. denied*, 475 U.S. 1132 (1986). We similarly conclude that the government's interest in discouraging the public from participating in commercial lotteries is sufficiently substantial to meet the requirements of *Central Hudson.*

We note that the government, throughout this litigation, has defined its interest broadly as reducing public participation in commercial lotteries. The evidence it has submitted to us pertains primarily to the pernicious effects of casino gambling. We will not take it upon ourselves to narrow the government's asserted interest sua sponte, however. Indeed, in light of the historical tradition of the regulation of commercial lotteries, we are persuaded that discouraging participation in such games of chance overall is a substantial interest.

We turn to the government's second asserted interest—"to assist states that prohibit casino gambling . . . by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate." The district court, casting this interest as accommodating the lottery policies of all states, recognized it as substantial. The government now asserts that the district court mischaracterized its interest. As the government explains, its interest is not in protecting state choice, but in protecting those states that choose not to permit casino gambling.[4]

The interest in protecting non-casino states was indirectly recognized in *Champion v. Ames*, 188 U.S.

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[4] This alleged mischaracterization is significant because the district court went on to rule that § 1304 did not directly advance the government's interest. The government concedes that if the protection of state choice were indeed its interest, the regulations at issue would not satisfy *Central Hudson*; however, the government contends, when the proper interests are recognized, the fit between legislative means and ends becomes clear.

321 (1903). In ruling that Congress had the authority to prohibit the interstate transport of lottery tickets, the Court stated:

> In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries . . . within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by an agency of interstate commerce.

Id. at 357. Although *Champion* is not directly on point, we read it to suggest that the government may indeed legitimately favor the interests of non-casino states.[5]

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[5] The government seeks further to support its interest by citing to legislative history. However, the cited history, although containing discussions of the need to protect non-lottery states, does so in a context which expressly recognizes state choice as the underlying interest. *See* S. Rep.No. 98-537, 98th Cong., 2d Sess., at 11-12 (Statement of Sen. Hatch) ("The laws currently in effect recognize the right of the individual states to make those decisions concerning lotteries and gaming that best respond to the desires of the people."); *see also* 1974 U.S.C.C.A.N. at 7011. Nonetheless, because the asserted interest need not be the original interest behind the legislation, the absence of support in the legislative history does not doom the government's purported interest. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (noting that the "insufficiency of the original motivation does not diminish other interests that the restriction may now serve").

We cannot ignore the fact that broadcast signals cannot be contained within state borders and individual states cannot control interstate broadcasts. Thus, as demonstrated here, advertisements that are broadcast from states which permit casino gambling will be viewed by residents in states which prohibit such conduct. Without the assistance of the federal government, non-casino states will have no effective means to protect their residents from such spillover; their antigambling policies would thus be compromised.

In reaching the conclusion that this second interest is indeed substantial, we reject the Broadcasters' assertion that our holding conflicts with *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993). In *Edge Broadcasting*, the Court upheld against First Amendment challenge federal statutes which prohibited the broadcast of lottery advertising by those broadcasters licensed in states which did not allow lotteries, while allowing such broadcasting by broadcasters in states where lotteries were permitted. In reaching its conclusion, the Court recognized as substantial the government's purported interest in protecting state choice. *See id.* at 2703-04. Nowhere in the opinion did the Court reason that the protection of non-lottery states at the expense of lottery states was unconstitutional, however. Indeed, there is language in *Edge Broadcasting* that suggests that the protection of non-lottery states may be a substantial interest. *See id.* at 2703 ("[W]e are quite sure that the government has a substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries.").

B

Having found both of the government's articulated interests to be substantial, we must next determine whether section 1304 directly advances these interests. Ultimately, what is required is "a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *Edge Broadcasting*, 113 S. Ct. at 2705. However, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Edenfield*, 113 S.Ct. at 1800 (quotations omitted). Rather, the government must demonstrate that "its restrictions will in fact alleviate [the asserted harms] to a material degree." *Id.*

We take special note of the recent decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), where the Supreme Court unanimously struck down two Rhode Island statutes which prohibited the advertising of alcoholic beverage retail prices anywhere other than at point of purchase.[6] While all nine justices concurred in the judgment, none of the rationales for doing so was able to garner a majority. Justice Stevens, joined by Justices Kennedy and Ginsburg, stated that in the context of the "drastic nature of the means chosen" to forward the state's interest in promoting temperance—"the wholesale suppression of truthful, nonmisleading informa-

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[6] The Supreme Court recently granted certiorari in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 69 F.3d 1296 (5th Cir.1995) and summarily remanded the case to the Fifth Circuit for further consideration in light of *44 Liquormart*. In *Greater New Orleans*, the Fifth Circuit had upheld the constitutionality of the very statute at issue in this case, 18 U.S.C § 1304 as amended by § 1307.

tion,"—the Court must determine whether the "price advertising ban will *significantly* reduce alcohol consumption." 116 S. Ct. at 1509 (emphasis in original). Justice Stevens firmly stated that Rhode Island could not rely upon mere "speculation and conjecture" to advance its interests. *Id.* at 116 S. Ct. at 1510. While *44 Liquormart* fails to present a coherent framework for reviewing these claims, one point is clear: the government's asserted interest in reducing demand for casino gambling seems less likely to succeed following the Court's decision.

By eliminating a potent means of persuasion, section 1304 would appear to advance directly the government's interest in discouraging public participation in commercial lotteries. It is true that, as the Broadcasters assert, the government has presented no studies demonstrating the link between public participation in gambling and the advertising thereof. *See Edenfield*, 113 S. Ct. at 1800-01 (rejecting State's claim that ban on personal solicitation by CPAs directly advanced State's interest in insuring ethical nature of practice because State presented no evidence of such connection). However, common sense suggests that advertising increases participation; indeed, were this not so, it is unlikely that casinos would seek to advertise on the Broadcasters' stations. Moreover, the Supreme Court has expressly recognized the connection between advertising and demand. *See Posadas*, 478 U.S. at 341-42 (concluding that ban on casino advertisements would serve to reduce public participation in casino gambling); *see also Central Hudson*, 447 U.S. at 557 (State's interest in reducing demand for electricity directly advanced by ban on promotional advertising).

That said, we are troubled by the numerous exceptions to section 1304. Although criminalizing broadcast advertising by commercial lotteries, the regulatory scheme at issue here permits the following lotteries to advertise via the airwaves: state-run lotteries, fishing contests, not-for-profit lotteries, lotteries conducted as promotional activities by commercial organizations, and, perhaps most significantly, any gaming conducted by Indian Tribes pursuant to the Indian Gaming Regulatory Act. See 47 C.F.R. § 73.1211(c). The question we thus must resolve is whether the existence of these myriad exceptions precludes section 1304 from directly advancing the government's purported interests.

We take guidance from the Supreme Court's recent decision in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). In *Coors Brewing*, the Court held 27 U.S.C. § 205(e)(2), which prohibited brewers from disclosing on labels the alcohol content of their beers, to be inconsistent with the First Amendment. The Court agreed with the government that the speech at issue concerned a lawful activity, and that the government's asserted interest—avoiding "strength wars"—was substantial. The Court was not persuaded that section 205(e)(2) directly advanced the asserted interest, however. In reaching this conclusion, the Court emphasized the numerous exceptions to section 205(e)(2), specifically noting that the regulatory scheme permitted both the disclosure of alcohol content in advertising (although prohibiting it on labels) and the disclosure of alcohol content on the labels of distilled spirits (although prohibiting it on beers). Deeming such a regulatory scheme "irrational," the Court explained that "[t]here is little

chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effect." *Id.* at 1593.

The government has consistently characterized its primary interest as "discouraging public participation in commercial lotteries, including casino gambling, and thereby minimizing the wide variety of social ills that have historically been associated with these forms of gambling." By the government's own description, then, its interest is an extremely broad one— reducing public participation in all *commercial lotteries*. Taking the government's claim at face value, the statutory scheme here would appear to be flawed in the same manner as section 205(e)(2) was in *Coors Brewing*. That is, because section 1304 permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, it is impossible for it materially to discourage public participation in commercial lotteries. To use the language of *Coors Brewing*, "[t]here is little chance that [the challenged regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Coors Brewing*, 115 S.Ct. at 1593.

In reaching our conclusion, we are not unmindful of the Supreme Court's earlier decision in *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986). In *Posadas*, the Court squarely rejected the argument that, because the challenged regulation permitted horse races, cockfights, and the lottery to advertise, the regulation could not advance the government's interest. The Court reasoned: "whether other kinds

of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." *Id.* at 342.

In reconciling our decision with *Posadas*, we note the substantial distinction between *Posadas* and the case that the government has presented here.[7] In *Posadas*, Puerto Rico defined its interest narrowly as "the reduction of demand for casino gambling by the residents of Puerto Rico." *Id.* at 341. As the Court explained,

> the legislature's interest, as previously identified, *is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling.* . . . In other words, the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico.

Id. at 342-43 (emphasis added).

Here, however, the government has consistently articulated as its interest the desire to reduce public participation in *all commercial lotteries*. Permitting

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[7] We note that following *44 Liquormart* much of the Court's reasoning in *Posadas*—especially its unquestioning acceptance of the state's assertions that the casino advertising ban furthered the government's interest in reducing the demand for gambling without being more extensive than necessary to serve that interest—is no longer as compelling. *See 44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring) ("The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored.")

some commercial lotteries to advertise—as 47 C.F.R. § 73.1211(c) does—would without doubt undermine this broad interest. Nor will recasting the government's interest to be merely the reduction of public participation in casino gambling aid the government. Here, unlike *Posadas*, the regulations contain an exception even for casino gambling—casinos operated by Indian Tribes pursuant to the terms of the Indian Gaming Regulatory Act are exempted from the provisions of section 1304.[8] *See* 47 C.F.R. § 73.1211(c)(3).

Having concluded that the government's purported interest in reducing participation in commercial lotteries fails to satisfy *Central Hudson*, we are left to consider whether the government's remaining interest meets this test. As noted, the government's second asserted interest is "to assist states that

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[8] This exception is significant to the government's own attempt to distinguish *Coors Brewing*. The government argues that "the problem in *Coors* was that the commercial speech allowed by Congress was *worse*, in terms of the 'strength war' policy, than the speech prohibited by Congress." In contrast, the government suggests, the exceptions enacted to section 1304 are readily explained "either in terms of the less pervasive impact of the advertised activities (for example, local charitable gambling) or the countervailing social benefits (federally regulated Indian gambling)."

Even accepting as true the government's purported distinction, we remain unpersuaded that the speech prohibited here is "worse" than that which is permitted. The government identifies casino gambling as the most pernicious and pervasive form of commercial lottery. What the government fails to recognize, however, is that it permits that speech which it claims to be most pernicious, by exempting Indian casinos from the reach of its regulations. Nor are we persuaded that "countervailing social benefits" are a relevant part of an analysis of direct advancement.

prohibit casino gambling . . . by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate."

The government argues that broadcast signals are not contained within state borders and tnat states cannot regulate the interstate transmission of broadcasting; accordingly, there is likely to be some spillover of casino advertisements from states in which casino gambling is permitted into neighboring states in which it is not. By prohibiting the advertising of casino gambling in *all* states, the government avoids this spillover, effectively keeping broadcast advertisements out of those states which have determined that casino gambling is undesirable. This, the government suggests, directly advances its interest.

Again, however, we are concerned by the numerous exceptions to section 1304. In particular, our attention is drawn to 47 C.F.R. § 73.1211(c)(3), which excludes "[a]ny gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act" from the reach of section 1304. Such exemption permits Indian Tribes to advertise both in states which allow casino advertising and in those which forbid it. This would appear to undermine the government's purported interest in protecting non-casino states from the reach of casino advertisements on the airwaves. It may be that such advertising is limited in scope, intruding little on non-casino states, and thus does not interfere with the government's interest in protecting those states. Unfortunately, however, the government has failed to provide any evidence demonstrating this fact—in the process failing to demonstrate that "its restrictions will in fact alleviate [the

asserted harms] to a material degree." *Edenfield*, 113 S. Ct. at 1800. Again, *Coors Brewing* and *44 Liquormart* counsel against holding that section 1304 satisfies the requirements of *Central Hudson*.[9]

III

Having concluded that section 1304 and the regulations thereunder fail to satisfy *Central Hudson*, we are compelled to strike them down as an unconstitutional infringement of the Broadcasters' First Amendment rights.

AFFIRMED.

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[9] Because we conclude that the challenged regulations do not directly advance the government's interests, we need not reach the final prong of *Central Hudson*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16191

D.C. No. CV-92-00400-PMP

VALLEY BROADCASTING COMPANY, DBA KVBC (TV), CHANNEL 13, LAS VEGAS, NEVADA, AND SIERRA BROADCASTING COMPANY, DBA KRNV (TV), CHANNEL 4, RENO, NEVADA, PLAINTIFFS

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS-APPELLANTS

[Filed Aug. 25, 1997]

ORDER

Before: BRUNETTI and O'SCANNLAIN, Circuit Judges; MERHIGE,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Brunetti and Judge O'Scannlain have voted to reject the suggestion for rehearing en

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

banc, and Judge Merhige recommends rejecting the suggestion.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. NEVADA

No. CV-S-92-400-PMP (RJJ)

VALLEY BROADCASTING COMPANY, DBA KVBC (TV), CHANNEL 13, LAS VEGAS, NEVADA, AND SIERRA BROADCASTING COMPANY, DBA KRNV (TV), CHANNEL 4, RENO, NEVADA, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

April 13, 1993

ORDER

PRO, District Judge.

Before the Court for consideration are Plaintiffs Valley Broadcasting Company and Sierra Broadcasting Company's Motions for Summary Judgment (# 18 and # 23) and Defendants United States of America and Federal Communications Commission's Cross-Motion for Summary Judgment (# 24).

I. Facts

Plaintiff Valley Broadcasting Company ("Valley") is a Nevada corporation licensed by the Federal Communications Commission ("FCC") to operate a television station, KVBC, in Las Vegas, Nevada. The

primary geographic market which KVBC serves is Las Vegas and Southern Nevada. KVBC's transmitter, however, has the capacity to produce a grade B signal which reaches the Utah/Nevada border.[1] Based on this, potentially 4% (13,200/302,200) of all households which may receive KVBC signals are Utah citizens. Similarly, Plaintiff Sierra Broadcasting Company ("Sierra") is a Nevada corporation licensed by the FCC to operate KRNV, a television station located in Reno, Nevada. Although the primary broadcast area for KRNV is Reno, approximately 19% (37,200/197,200) of the households which receive KRNV signals reside in California. *See* Cross-Motion for Summary Judgment (# 24), Exhibit C.[2]

Plaintiffs desire to broadcast commercials related to legal gaming activities located in Nevada such as blackjack, craps, poker, roulette, slot machines, and other lawful games of chance. Reply (# 28) at 3.[3]

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[1] Typically, television signals are broken down into two signals: one, a grade A or city grade signal, and two, a grade B signal. Although a grade B signal is theoretically strong enough to be viewable, a number of things such as the physical contours of the surrounding area (e.g., mountains) may affect the overall reception of a grade B signal. *See* Counter-Motion for Summary Judgment (# 24), Exhibit C at 14-23.

[2] Approximately 1,800,000 people presently live in Utah, while California's population is approximately 30,400,000. Statistical Abstract of the United States 1992, 112th Ed., at 22.

[3] It is undisputed that advertising of casino gambling is pervasive in Nevada including, but not limited to, such modes as billboards, outdoor advertising, flyers, magazines, newspapers, direct mail, brochures, and cable television other than origination cablecasting. Motion for Summary Judgment (# 18), Exhibit 3 at 2; Second Motion for Summary Judgment (# 23), Exhibit 12. In addition, advertisements relating to

Plaintiffs, however, have been deterred from doing so based on the FCC's enforcement of 18 U.S.C. § 1304[4] and 47 C.F.R. § 73.1211[5], which prohibit the broadcast

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casino gaming may be received by residents in adjacent states through such means as billboards on interstate highways and the receipt of Nevada periodicals and newspapers such as the Las Vegas Review Journal. Motion for Summary Judgment (# 18), Exhibit 5; Second Motion for Summary Judgment (# 23), Exhibits 11, 12.

[4] 18 U.S.C. § 1304 provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year or both.
>
> Each day's broadcasting shall constitute a separate offense.

[5] 47 C.F.R. § 73.1211 provides in pertinent part:

> (a) No licensee of an AM, FM, or television broadcast station, . . ., shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependant in whole or in part upon lot or chance, . . .
>
> (b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or other thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are

of all promotional advertising involving casino gambling. Motion for Summary Judgment (# 18), Exhibit 3 at 3.[6] In support of this policy, the FCC maintains

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required to furnish any money or other thing of value . . .

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to an advertisement, list of prizes or other information concerning:

(1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or any other State which conducts such a lottery. . . .

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act. . . .

(4) A lottery, gift enterprise or similar scheme . . . that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization; or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(d)(1) For purposes of paragraph (c) of this section, "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting wagers or contests.

[6] Although Plaintiffs cannot point to any current criminal prosecution under § 1304, the record is clear that the FCC actively enforces both § 1304 and § 73.1211 through the issuance of fines and other penalties. Second Motion for Summary Judgment (# 23), Exhibits 8, 9, and 10.

that it has a substantial interest in inhibiting the growth of legalized gambling and its perceived social ills, as well as a federalism interest in furthering the public policies of California and Utah which prohibit casino gambling. *See* Cross-Motion for Summary Judgment (# 24) at 41-48: Reply (# 40) at 7-16.

Plaintiffs seek injunctive relief and a declaratory judgment from this Court that gambling and casino activities which are legal in the State of Nevada do not come within the scope of § 1304 or § 73.1211, or if they do, that the statute and regulation as construed by the FCC are unconstitutional. Plaintiffs argue that: (1) advertising casino gaming is not a "lottery, gift enterprise, or similar scheme" within the meaning of § 1304 and § 73.1211; (2) that § 1304 and § 73.1211 as applied to casino gambling violate the First Amendment's protection of commercial speech; and (3) the FCC's prohibition on advertising of casino gaming by television or radio stations, and not other forms of the media, violates the Equal Protection Clause.

II. Standard of Review

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970);

Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 (9th Cir. 1982). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1355-56 (1986); *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006, 108 S. Ct. 698, 98 L.Ed.2d 650 (1988).

If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L.Ed.2d 569 (1968); *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270 (9th Cir. 1979). Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S. Ct. 1790, 60 L.Ed.2d 241 (1979). Likewise,

"legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." *Id.*

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982); *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (9th Cir. 1982).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. *Admiralty Fund v. Tabor*, 677 F.2d 1297, 1298 (9th Cir. 1982).

The trilogy of Supreme Court cases cited above establishes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327, 106 S. Ct. at 2555, *quoting* Fed. R. Civ. P. 1). *See also Avia Group Int'l. Inc. v. L.A. Gear Cal.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

III. Discussion

A. Standing

Defendants contend that Plaintiffs do not have standing to challenge § 1304 and § 73.1211. More specifically, Defendants contend that Plaintiffs are not presently threatened with prosecution under § 1304, and that Plaintiffs have not given any particulars about the advertisements which they desire to broadcast. Cross-Motion for Summary Judgment (# 24) at 10. This Court disagrees.

As illustrated by the Exhibits submitted by Plaintiffs, the FCC actively enforces the provisions of § 1304 and § 73.1211 through the use of fines ranging up to $12,500. Second Motion for Summary Judgment (# 23), Exhibit 8. Moreover, Plaintiffs have clearly stated the nature and content of the advertisements which they desire to broadcast, and the FCC has historically found similar advertisements in violation of these provisions. Second Motion for Summary Judgment (# 23), Exhibits 8, 9, and 10. Accordingly, since Plaintiffs have demonstrated a reasonable threat of injury as a result of the FCC's enforcement of § 1304 and § 73.1211, this Court finds that Plaintiffs have standing to bring their present claims. *See Adult Video Association v. Barr*, 960 F.2d 781, 785-86 (9th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3371 (Nov. 2, 1992).

B. The Applicability of § 1304 to Casino Gambling

Plaintiffs argue that § 1304, by its terms, does not prohibit broadcasting advertisements relating to casino gaming. Plaintiffs insist that in order to fall within the scope of § 1304, the advertisement must relate to a "lottery, gift enterprise, or similar

scheme." Plaintiffs contend that since casino games such as blackjack, craps, or roulette are qualitatively different than a "lottery" or "gift enterprise," such games cannot be considered "similar schemes" under § 1304.[7]

The seminal case which defines the terms "lottery, gift enterprise, or similar scheme" is *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 74 S. Ct. 593, 98 L.Ed. 699 (1954). In *American Broadcasting*, recognizing that the language and legislative history of § 1304 was somewhat unclear, the Supreme Court stated that there are three essential elements of a "lottery, gift enterprise, or similar scheme": (1) the distribution of prizes; (2) according to chance; (3) for consideration. *Id.* at 289-91, 74 S. Ct. at 597-98; *see also* 47 C.F.R. § 73.1211(b).

Applying these elements to the casino activities which Plaintiffs desire to advertise in Nevada leads to the inescapable conclusion that such games fall within the reach of § 1304. There can be no real dispute that the money bet in such games qualifies as consideration, the money received upon a successful wager constitutes a prize, and that winning these

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[7] The narrow meaning which Plaintiffs ascribe to the terms of "lottery" and "gift enterprise" are discussed in a footnote in *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 74 S. Ct. 593, 98 L.Ed. 699 (1954) which stated:

> A typical 'lottery' is a scheme in which tickets are sold and prizes are awarded among the ticketholders by lot. A typical 'gift enterprise' differs from this in that it involves the purchase of merchandise or other property; the purchaser receives, in addition to the merchandise or other property, a 'free' chance in a drawing.

Id. at 290, n. 8, 74 S. Ct. at 598, n. 8.

games is dependant largely on chance. Therefore, Plaintiffs' argument that casino gaming does not fall within the scope of § 1304 must be rejected.

C. First Amendment

Plaintiffs next argue that a ban on the proposed gaming advertisements violates their rights to commercial free speech under the First Amendment.

In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court recognized that First Amendment protects commercial speech, or speech which is related solely to the economic interests of the speaker and its audience, from unwarranted governmental regulation because it serves the "economic interest of the speaker, . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 562-63, 100 S. Ct. at 2349-50. The Supreme Court further recognized that:

> In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them.'

Id. at 562, 100 S. Ct. at 2349 (citations omitted).

Based on these principles, the Supreme Court in *Central Hudson* established a four-part analysis for evaluating the constitutionality of governmental regulations limiting commercial speech. Under this analysis, a court must ask: (1) does the commercial

speech involved concern lawful activity which is not misleading; (2) if so, is there a substantial governmental interest in regulating such speech; (3) if so, does the regulation directly advance the governmental interest asserted; and finally, (4) is the regulation more extensive than necessary to serve the governmental interest. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351; *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028, 3032, 106 L.Ed.2d 388 (1989). In applying this analysis to the case, the FCC bears the burden of demonstrating a substantial state interest, as well as justifying the scope of any restrictions advancing this interest. *See Fox*, 492 U.S. at 480, 109 S. Ct. at 3034; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647, 105 S. Ct. 2265, 2279, 85 L.Ed.2d 652 (1985).

With regard to the first prong, Defendants concede, as they must, that the advertisements which Plaintiffs propose to broadcast relate to lawful activity within the State of Nevada and are not misleading. Cross-Motion for Summary Judgment (# 24) at 41, n. 25. Therefore, this Court has little difficulty finding that advertisements relating to lawful casino gaming within Nevada constitute commercial speech protected by the First Amendment.

As to *Central Hudson's* second prong, Defendants assert two substantial interests which are served by a ban on all television and radio advertising of legalized casino gambling: (1) a federalism interest in protecting the policies of states which have not legalized casino gaming; and (2) retarding the growth of private gambling which has been associated with harmful social effects including the spread of or-

ganized crime. *See* Cross-Motion for Summary Judgment (# 24) at 41-48: Reply (# 40) at 7-16.

Several courts, including the Supreme Court, have recognized that within its borders, a state has a substantial interest in regulating the health, safety, and welfare of its citizens; that gambling implicates these concerns; and that the federal government has an interest protecting state choice on this issue. *See Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341, 106 S. Ct. 2968, 2976 (1986); *United States v. Stuebben*, 799 F.2d 225, 228-29 (5th Cir. 1986); *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633, 638-39 (E.D. Va. 1990), *affirmed*, 956 F.2d 263, *cert. granted*, 506 U.S. 1032, 113 S. Ct. 809, 121 L.Ed.2d 683 (1992); *Minnesota Newspaper Ass'n v. Postmaster General*, 677 F. Supp. 1400, 1404 (D. Minn. 1987), *appeal dismissed* 488 U.S. 998, 109 S. Ct. 632, 102 L.Ed.2d 766 (1989); *compare Bigelow v. Virginia*, 421 U.S. 809, 822-25, 95 S. Ct. 2222, 2232-34, 44 L.Ed.2d 600 (1974). As a result, this Court finds that Defendants have a "substantial state interest" in exercising their commerce clause powers in a manner which respects individual state choice with regard to gambling.

This Court, however, rejects Defendants' argument that the desire to curtail the spread of organized crime and the social costs of legalized gambling warrants the ban on advertising of casino gaming at issue in this case. With respect to furthering the spread of organized crime, other than reiterating the well-worn argument that the large sums of cash utilized in casino operations are attractive to criminal elements, Defendants offer no specific evidence to support their assertion that licensed modern day casinos, which are

subjected to heavy regulation, are the serious vehicles of organized crime. *See Zauderer*, 471 U.S. at 647, 105 S. Ct. at 2279, *compare, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221, 107 S. Ct. 1083, 1094, 94 L.Ed.2d 244 (1987). Furthermore, to the extent casino gaming can be viewed as an attraction to elements of organized crime, Defendants offer no evidence that such elements are any more pervasive in casino gaming than in other forms of gaming for which no advertising limitations are enforced by the FCC.

Similarly, the social costs associated with legalized gambling, while very real, are hardly limited to casino gambling. They are common to all forms of legalized gambling including state lotteries, Indian casinos, horse racing, and charitable gambling. In light of the fact that Congress has allowed interstate advertising of these latter forms of gambling and has generally left the question of whether to permit and regulate gambling to the states, it makes sense that the primary federal interest relating to the social costs of gambling is limited to the protecting individual state choice on this issue. *See* 18 U.S.C. § 1307; 47 C.F.R. § 73.1211(c); *dicta, United States v. Gambling Devices*, 346 U.S. 441, 450-452, 74 S. Ct. 190, 195-196, 98 L.Ed. 179 (1953); *United States v. King*, 834 F.2d 109, 111-113 (6th Cir. 1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988); *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc.*, 802 F. Supp. 662, 668-69 (D.R.I. 1992), *affirmed*, 989 F.2d 1266 (1st Cir. 1993).

The third prong of *Central Hudson* requires Defendants to demonstrate that § 1304 directly advances

its interest in protecting state choice on the issue of casino gambling. Defendants "cannot regulate speech that poses no danger to the asserted state interest." *Central Hudson*, 447 U.S. at 565, 100 S. Ct. at 2350. Furthermore, governmental prohibitions which are speculative and only remotely advance the state interest involved simply cannot justify silencing promotional advertising. *Id.* at 569, 100 S. Ct. at 2353; *Edge Broadcasting Co.*, 732 F. Supp. at 639. After careful consideration of the activity which is banned here and the interests of all those involved, it is clear to this Court that § 1304 as it is currently applied against Plaintiffs fails to satisfy the third prong of *Central Hudson*.

As stated earlier, Defendants' substantial state interest in this case is its federalism concern of protecting state choice on the issue of gambling. It is clear that the states implicated in this case, Nevada, Utah, and California, have divergent perspectives on the social desirability of gambling and casinos.

It is undisputed that the stated public policy of Nevada is strongly aligned with the promotion of legitimate and intensely regulated casino gaming which is free from criminal and corruptive elements. *See* N.R.S. § 463.0129. Utah, by comparison, has clearly demonstrated a public policy against such activity by not allowing any form of legalized gambling within its borders. *See* Supplement to Second Motion for Summary Judgment (# 43), Exhibit 22. Although California's public policy reflects an apparent objection to casino gambling, it allows almost every other form of gambling including a state lottery, horse racing, pari-mutual wagering, Indian gaming where unlimited bingo and slot machines are

permitted, and card rooms. *Id.*; *see also Cabazon Band of Mission Indians*, 480 U.S. at 210-22, 107 S. Ct. at 1088-95; *Syucan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1502-03 (S.D. Cal. 1992); *compare Crockford's Club Limited v. Si-Ahmed*, 203 Cal. App.3d 1402, 250 Cal. Rptr. 728, 730 (1988).

Given the fact that the distance traveled by television broadcasts cannot be delineated as precisely as state borders, this Court recognizes that Defendants face a difficult task in reconciling the divergent public policies of California, Nevada, and Utah. Nonetheless, promotional advertising of casino gambling broadcast only from Nevada stations will serve an audience which consists overwhelmingly of Nevada residents within the borders of the State of Nevada, and involves conduct occurring lawfully within the confines of Nevada. Although the evidence before the Court suggests that an extremely small percentage of California and Utah residents may turn on their televisions and see KRNV or KVBC signals, this Court finds it difficult to accept that commercials about legalized casino gambling located in Nevada pose any real danger to the public policies of California and Utah regarding casino gambling. *Compare Edge Broadcasting Co.*, 732 F. Supp. at 639-41.

Recognizing Defendants' duty to attempt to respect the policies of all states regarding gambling, and most importantly, the principles underlying the First Amendment's protection of commercial speech, this Court finds that Defendants' current application of § 1304 and § 73.1211, which effectively imposes a ban on Nevada television stations from broadcasting any promotional advertising relating to casino gambling, only remotely advances its federalism interest. Ac-

cordingly, such a ban fails the third prong of *Central Hudson*, and violates Plaintiffs' First Amendment rights to commercial free speech.

Finally, under the fourth prong of *Central Hudson*, a restriction on commercial speech must be no more extensive than necessary to further the asserted state interest. *Central Hudson*, 447 U.S. at 568-70, 100 S. Ct. at 2352-54. The Court finds that Defendants' present enforcement policy regarding § 1304 and § 73.1211 is not one which is the most narrowly drawn to serve its federalism interests. The deficiency in Defendants' enforcement policy is well illustrated by reference to expressed Congressional policy regarding advertising of state lotteries. In attempting to satisfy the interests of federalism and still respect the public policy views of both lottery and non-lottery states, Congress reached a sensible accommodation by limiting the broadcast of lottery advertisements to television or radio stations located within states which permit such activity. *See* 18 U.S.C. § 1307; 47 C.F.R. 73.1211. This Court fails to see why such a common sense restriction, which is undoubtedly less restrictive than Defendants' complete ban, would not equally apply with respect to casino and non-casino states. In light of this alternative, as well as the fact that broadcasts by KVBC and KRNV at best only incidentally impact the populations of California and Utah, this Court also finds that the categorical ban enforced by Defendants in this case provides "only the most incremental support" for Defendants' federalism interests. Therefore, it does not satisfy the "reasonable fit" required under the fourth prong of *Central Hudson*. *Compare City of Cincinnati v. Discovery Network,*

Inc., et al., 507 U.S. 410, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993).

D. Equal Protection

Finally, Plaintiffs claim that Defendants' current application of § 1304 and § 73.1211 violates the Equal Protection Clause. Unlike the third and fourth prongs of *Central Hudson*, which require that a regulation directly advance a substantial state interest in a narrowly drawn manner, to satisfy the requirements of the Equal Protection Clause, Defendants need only show a "legitimate state interest" which is not "wholly irrelevant to the achievement of the State's objective." *See Posadas*, 478 U.S. at 344-45 n. 9, 106 S. Ct. at 2978-79 n. 9; *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 752-53 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259, 104 S. Ct. 3553, 82 L.Ed.2d 855 (1984). Given that Defendants have demonstrated a substantial federalism interest and this Court cannot characterize Defendants' ban as "wholly irrelevant," Plaintiffs' Equal Protection claim must be rejected.

IV. Conclusion

In sum, this Court finds that even though § 1304 does apply to Plaintiffs and does not violate the Equal Protection Clause, Defendants' wholesale ban on all broadcasts of promotional advertising of legalized casino gambling by Plaintiffs does not satisfy the requirements of *Central Hudson*. Plaintiffs KVBC and KRNV are, therefore, entitled to the declaratory relief they seek.

ORDER

IT IS THEREFORE ORDERED that Plaintiffs' First Motion for Summary Judgment (# 18) is hereby denied.

IT IS FURTHER ORDERED that Plaintiffs' Second Motion for Summary Judgment (# 23) is hereby granted to the extent described above.

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment (# 24) is hereby denied.

Supreme Court, U.S.
FILED
JAN 22 1998
CLERK

(2)

No. 97-1047

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

VALLEY BROADCASTING COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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21 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Sunbelt Communications Company is the parent of both respondents Valley Broadcasting Company and Sierra Broadcasting Company.

There are two nonwholly owned subsidiaries of Valley Broadcasting Company: Alta Development Co. and Microwave, Inc.

There are no nonwholly owned subsidiaries of respondent Sierra Broadcasting Company.

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RESPONDENTS' BRIEF IN OPPOSITION

The procedural question presented by the Government, whether the Ninth Circuit erred in failing to remand the case for the taking of further evidence under *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), was not raised at the appropriate time in the court below, and does not warrant review by this Court in any event. The Government does not seek review of the constitutional question whether the ban on over-the-air commercial casino advertising contained in 18 U.S.C. § 1304, as amended, violates the First Amendment (Pet. 12, 24), which is unquestionably raised by the decision below. Rather than deny certiorari forthwith because the procedural question presented by the Government does not warrant review, however, the Court is respectfully requested to hold this case in abeyance pending a decision on the same First Amendment question by the Fifth Circuit in the case of *Greater New Orleans Broadcasting Ass'n v. United States*, 117 S. Ct. 39 (1996), which was remanded by this Court over a year ago for further consideration in the light of *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). In its initial decision the Fifth Circuit upheld the constitutionality of § 1304, as amended, and if that court on remand reaffirms its earlier ruling there will be a conflict between the circuits on the constitutional question, which will warrant review of both cases by this Court. If the merits of the constitutional question raised by this case are going to be heard by this Court, respondent broadcasters respectfully request to be heard on that question.

I.

THE PROCEDURAL QUESTION

A. The Question Presented was not raised at the appropriate time below.

In its Question Presented and its Statement of the Case the Government contends that the Ninth Circuit did not deal fairly with the Government concerning this Court's decision in *Coors*. There is no basis for such contention. In its Question Presented the Government points out that *Coors* was decided while the appeal in this case was pending, and contends that the Ninth Circuit erred in

> invalidating Section 1304 without allowing the government to present evidence bearing on the constitutionality of the statute under *Coors*.

(Pet. (I)). In its Statement the Government recites that the case remained pending on appeal for nearly four years, that during that time this Court issued intervening decisions in a number of commercial speech cases, listing six, and indicates that the most significant of those intervening decisions is *Coors* (Pet. 8-9), because the holding of the Ninth Circuit rested chiefly on the decision in *Coors* (Pet. 10).

What the Government fails to mention, however, is that shortly after *Coors* came down, the Ninth Circuit ordered the parties to brief the question of the applicability of *Coors* to this case. (*See* Order filed May 3, 1995). Surely, if the Government felt that *Coors* required a remand of this case for the presentation of additional evidence "bearing on the constitutionality of the statute under *Coors*", that was the time to say so. The Government duly submitted a Supplemental Brief to the Ninth

Circuit on May 17, 1995. Nowhere in the Government's Supplemental Brief is there any request for, or even any suggestion of, a remand to enable the Government to submit additional evidence bearing on the constitutionality of the statute under *Coors*. The Government's position in its Supplemental Brief was simple and straightforward: with one minor exception not here relevant, this Court's analysis in *Coors* "is consistent with the positions taken by the Government in this case." (Supplemental Brief for the Appellants, p. 4).

It was only after the Ninth Circuit ruled against the Government — on the basis of a contrary interpretation of the applicability of *Coors* to this case — that the Government discovered a need for a remand for the taking of additional evidence on the constitutional question. In a Petition for Rehearing and Suggestion for Rehearing En Banc filed after the Ninth Circuit decision, the Government, for the first time, raised the question of a remand for the taking of additional evidence under *Coors*. Manifestly, the Government's real quarrel is with the Ninth Circuit's application of *Coors* to this case, not with the state of the evidence in the record.

B. The Question Presented does not warrant review.

Before addressing the question of a remand, it should be noted that there is no basis for the Government's contention that the Ninth Circuit read *Coors* and the other intervening decisions of this Court as "imposing a new evidentiary burden on the Government" (Pet. 12). It is true that in discussing the evidentiary burden on the Government the Ninth Circuit quoted the language of this Court in *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993), one of the intervening decisions of which the Government complains (Pet. 23, n. 12), that the Government's burden

> is not satisfied by mere speculation or conjecture; rather, a Governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real . . .

(App. 7a). However, the Ninth Circuit also cited and quoted *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648 (1984), decided well before this case began, for the same proposition:

> [t]he State's arguments amount to little more than unsupported assertions; nowhere does the State cite any evidence or authority of any kind for its contention . . .

(App. 7a). The District Court had also cited *Zauderer* in its description of the burden of proof placed on the Government under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), along with *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989) (App. 33a), and *Zauderer* was the first case cited by this Court for its statement of the burden on the Government in *Edenfield* (507 U.S. at 771). The burden of proof on the Government in commercial speech cases has been well established since *Zauderer*, if not before[1], and the Government in this case submitted no evidence to the District Court on the question of advertising by Indian casinos at its peril.[2]

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1. *See Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 71, n.20 (1983) and *Central Hudson*, 447 U.S. at 569.

2. It can hardly be said that the Ninth Circuit read the intervening cases "as imposing a new evidentiary burden on the Government" (Pet. 12), when that court in fact went in the other direction and reversed the District Court's ruling that the Government

(Cont'd)

The Government seeks a remand for the taking of additional evidence bearing on the constitutionality of 18 U.S.C. § 1304, as amended, under this Court's decision in *Coors*. Additional evidence is not needed at this late date, however, to do what this Court did in *Coors*, apply the four part test of the constitutionality of Government restrictions on commercial speech set forth in *Central Hudson*.[3] As to the first part of that test, it is undisputed that the casino advertising at issue concerns lawful activity and is not misleading (App. 6a). Under the second part of the *Central Hudson* test the Ninth Circuit found that both of the interests which the Government claims are advanced by the restriction on commercial speech in this case are substantial. Those interests are (1) an interest in reducing public participation in commercial lotteries;[4] and (2) an interest in

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(Cont'd)
had failed to meet its burden of proof that the interest in reducing public participation in commercial lotteries was substantial (App. 7a-10a).

3. In *Central Hudson* the test was stated as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted Governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the Governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Id.* at 566.

4. At p. 7 of its Petition the Government states that this interest is "minimizing the social costs traditionally associated with gambling activities", and that § 1304 advances this interest by "reducing (Cont'd)

protecting states which do not permit casino gambling. (App. 7a-12a). Under the third part of the test, whether § 1304, as amended, directly advances those interests, the Ninth Circuit took its guidance from *Coors* (App. 15a). This Court stated in *Coors*:

> We conclude that § 205(e)(2) cannot directly and materially advance its asserted interest because of the overall irrationality of the Government's regulatory scheme.

115 S. Ct. 1585, 1592. The Ninth Circuit found that the same is true of § 1304, as amended, in this case, and the record fully supports that determination.[5]

1. The regulatory scheme is irrational as regards the interest in reducing public participation in commercial lotteries.

Over the years, since its adoption in 1934, § 1304 has been amended repeatedly, with each amendment easing the restriction on the broadcast advertising of lotteries. The most recent (1988) amendments, in 18 U.S.C. § 1307(a)(2) and the Indian Gaming Regulatory Act, 25 U.S.C. § 2720, now authorize the broadcast advertising of commercial lotteries by

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(Cont'd)
public demand for gambling", whereas at the bottom of p. 9 it reverts to the same shorthand used by the courts and the parties below by referring to the interest as "discouraging public participation in gambling activities". Respondents do not see any difference between these two ways of describing the Governmental interest except that the first is longer.

5. Because the Ninth Circuit found that the regulation failed the third part of the *Central Hudson* test, it did not reach the fourth (App. 20a).

not-for-profit organizations, governmental organizations, commercial organizations when promotional, occasional and ancillary to the primary business of the organization, and by Indian casinos. What has happened here is that a statute which constituted a complete ban on all over-the-air commercial lottery advertising from 1934 until 1988 has been changed to a regulatory scheme in which all forms of commercial lottery advertising, including Indian casino advertising, are now permitted, except for state-licensed casino advertising. The Government contends that this regulatory scheme directly and materially advances a governmental interest in reducing public participation in commercial lotteries, without ever explaining how its exemption of all other forms of commercial lotteries from the ban is not fundamentally contrary to that contention. The Government's position is simply irrational. As the Ninth Circuit states concerning the ban on commercial casino advertising:

> To use the language of *Coors Brewing*, "[t]here is little chance that [the challenged regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Coors Brewing*, 115 S. Ct. at 1593.

In short, the Government purports to directly and materially reduce public participation in commercial lotteries by permitting the broadcast advertising of such lotteries for the first time, which does not make sense.

2. The regulatory scheme is irrational as regards the interest in protecting states which prohibit casino gambling.

The irrationality of the regulatory scheme with regard to the Government's second governmental interest can be shown

by contrasting 18 U.S.C. § 1307(a)(2), the statutory amendment to § 1304 at issue in this case, with 18 U.S.C. § 1307(a)(1), its companion provision which was before this Court in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). Section 1307(a)(1), which was at issue in *Edge*, on its face applies to an ad for a lottery "conducted by a state" and "broadcast by a radio or television station licensed to a location in that state or a state which conducts such a lottery" (§ 1307(a)(1)(B).[6] On the other hand, § 1307(a)(2), the section of the statute at issue in this case, on its face applies to an ad for a lottery other than a lottery conducted by a state (*e.g.*, a casino game), "that is authorized or not otherwise prohibited by the State in which it is conducted." (§ 1307(a)(2)). In § 1307(a)(2), however, there is no limitation as to the location of broadcasting stations which can carry the ad. There are additional restrictions addressed to the nature of the entity which may conduct the lottery (casino game), *i.e.*, not-for-profit or governmental organizations, *etc.*, but there is no restriction on the broadcast of such an ad by any radio or television station anywhere.

Thus, for example, under § 1307(a)(2)(A) an ad for the slot machines at Las Vegas' McCarran International Airport, which are conducted by a Governmental organization, Clark County, can be carried by radio and television stations in Nevada, which permits casino gambling, or by stations in California

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6. In *Coors* this Court stated that in *Edge*:

> we upheld a federal law that prohibited lottery advertising by radio stations located in states that did not operate lotteries. . . . We upheld the statute against First Amendment challenge in part because it supported North Carolina's antigambling policy without unduly interfering with States that sponsored lotteries.

115 S. Ct. at 1591.

and Utah, states which do not permit casino gambling. How does this "protect states which do not permit casino gambling"?

The same is true of ads for Indian casinos. Under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, a tribe is required to obtain Department of the Interior approval of a compact with the state in which it is located before it can operate a casino, but once that is done, under 25 U.S.C. § 2720, the Indian casino is wholly exempt from 18 U.S.C. § 1304 and is free to broadcast ads for its casino games anywhere, in states which permit casinos or in states which prohibit them. In *Coors* this Court said:

> The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars.

(115 S. Ct. at 1592). To paraphrase *Coors*, permitting stations in states which do not permit casino gambling to carry ads for Indian casinos makes no rational sense if the Government's true aim is to protect states which do not permit casino gambling. As the Ninth Circuit states with reference to the exemption for ads for Indian casinos:

> Such exemption permits Indian Tribes to advertise both in states which allow casino advertising and in those which forbid it. This would appear to undermine the Government's purported interest in protecting non-casino states from the reach of casino advertisements on the airwaves.

(App. 19a). As in *Coors*, the problem with the Government's restriction on commercial speech here is that the regulatory

scheme does not make sense from the point of view of the governmental interests purportedly being served. That being the case, the restriction cannot directly and materially advance those interests.

In its discussion of Indian casinos the Ninth Circuit goes on to remark that the record does not contain any evidence showing the extent of their advertising (App. 19a), the single statement on which the Government's entire petition for certiorari is based. The Government indicates that the additional evidence it would submit on remand would address the question of the relative scope of Indian casino gambling to commercial casino gambling (Pet. 23-24). In its Petition for Rehearing and Suggestion for Rehearing En Banc below the Government stated that it was then preparing evidence regarding the scope of Indian casino advertising, as well as other evidence, in another pending suit challenging the constitutionality of § 1304, *Players International, Inc. v. United States*, No. 96-4911 (D. N.J.), and that "if this case were remanded it would present similar evidence here" (Petition for Rehearing, p. 15, n.7). In its petition for certiorari, however, the Government acknowledges that *Players* has recently been decided and that, in spite of the Government's additional evidence, the district court there also ruled that § 1304 is unconstitutional under *Central Hudson* (Pet. 11, fn. 5). Thus, in effect, what the Government is asking this Court to do is to grant certiorari and reverse and remand this case for the taking of additional evidence which another court has already found inadequate to sustain the constitutionality of § 1304, as amended. Surely, no useful purpose would be served by such a remand.

3. Turner I does not support a remand of this case.

The Government places heavy reliance on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) in its argument for a remand for the taking of further evidence

in this case. The fact that this Court ordered a remand for the taking of further evidence in *Turner I*, however, does not mean that such action would be appropriate here. A critical factor distinguishing *Turner I* from this case is the fact that in *Turner I* the district court had granted summary judgment for the Government although the Government had not moved for such relief or filed documentation to support a summary judgment in its favor. As the Court said:

> Each of the plaintiffs filed a motion for summary judgment; several intervenor-defendants filed cross-motions for summary judgment; and the Government filed a cross-motion to dismiss. Although the Government had not asked for summary judgment, the District Court, in a divided opinion, granted summary judgment in favor of the Government and the other intervenor-defendants, . . .

114 S. Ct. 2445 at 2455.

Under those circumstances, when fact questions arose in the course of the Court's examination of the record, it would hardly have been fair to the Government to reverse the summary judgment in its favor without giving it an opportunity to submit evidence in support of summary judgment. As Justice Blackmun stated in his concurring opinion:

> Because in this case there remain a few unresolved issues of material fact, a remand is appropriate. The Government had occasion to submit to the District Court only portions of the record developed by Congress. In light of the Court's opinion today, those portions, which were submitted to defeat a motion for summary judgment, are not adequate to support one.

Id. at 2472-2473.

Unlike *Turner I*, in this case both the Government and respondent broadcasters moved for summary judgment and submitted extensive evidence in support of their respective positions (App. 23a). The Government does not deny that the respondents argued in the district court that the advertising of Indian casinos, along with the other exceptions to § 1304, precluded that section from "directly advancing" the Government's interests (Pet. 7). Nor does the Government dispute that, as indicated previously (*See* Section I. B above, p. 3), the burden of "demonstrating a substantial state interest, as well as justifying the scope of any restrictions advancing this interest", as the District Court put it (App. 33a), was on the Government. In spite of this burden, the Government made a tactical decision not to submit any evidence at all in the district court on Indian casino advertising, or any of the other exceptions to § 1304 (Pet. 7-8). The Government now explains in some detail that it did so in reliance on its interpretation of this Court's decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328 (1986). *id.*[7] The fact that the law has changed, and that *Posadas* may no longer be good law on some points, does not mean that this Court should remand this case to enable the Government to correct what it apparently now has concluded was a tactical error.[8] There is no basis in fact or law for a remand for the taking of further evidence in this case.

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7. Respondents had assumed that the reason for the Government's total failure to submit any such evidence was because it would not help the Government's case.

8. In view of *Players,* however, the tactical decision in this case does not look so bad.

II.

THE CONSTITUTIONAL QUESTION

As noted at the beginning of this brief, the Government in its petition for certiorari does not raise the constitutional question decided below, but indicates that it may do so in a later case (Pet. 12, 24). Rather than deny certiorari summarily in this case, respondents request the Court to hold this case in abeyance pending a decision in *Greater New Orleans*, now pending before the Fifth Circuit on remand, which involves the same First Amendment question. In addition to defending the Ninth Circuit decision on the constitutional question, respondents would propose another analysis of the case which leads to the same conclusion. The selective nature of the restriction imposed on the speech of broadcasters here mandates that the regulatory scheme be found to violate the First Amendment, without regard to whatever governmental interests may be behind this restriction on speech.

It is undisputed that the speech at issue, the broadcast advertising of casinos licensed and regulated by the State of Nevada, concerns lawful activity and is not misleading (App. 6a). Under § 1304, as amended, an advertisement for a casino game — "Play our slot machines", for example — is acceptable for broadcast over the air if it is spoken by or on behalf of (1) a not-for-profit organization; (2) a governmental organization; (3) a commercial organization if the game is promotional and clearly occasional and ancillary to the primary business of that organization; or (4) an Indian casino. On the other hand, the same advertisement is barred from broadcast over the air if it is spoken by or on behalf of a casino licensed and regulated by a state (§ 1304). It is submitted that the selective nature of this restriction on lawful, nonmisleading speech, without more,

requires that this restriction be found contrary to the First Amendment.[9]

For over 50 years, from 1934 until 1988, under § 1304 the carriage of casino advertising by broadcasters was barred by law, presumably on the ground that such advertising was injurious to the public. Neither respondents nor any other broadcasters ever challenged that ban during all those years. Now, however, the law has been changed and broadcasters are permitted to carry casino advertising on behalf of the parties enumerated in § 1307(a)(2), and on behalf of Indian casinos, but not on behalf of state licensed and regulated casinos.

If the first part of the *Central Hudson* test is met, as it concededly is here, this commercial speech is "protected by the First Amendment", *Central Hudson*, 447 U.S. at 566. Assuming, arguendo, that because it is merely commercial speech the Government has a right to restrict this speech to some extent, the fact remains that it is still speech that is being broadcast over the air to the public, it is about lawful activity, and it is not misleading. The fact that this speech is protected by the First Amendment must mean, at the least, that the Government must have a rational basis for whatever restriction it imposes, and that such restriction must somehow be related to the public good, whether it is called the public interest, or protecting the public from injury, or whatever.

The problem with the statutory scheme under § 1304, as amended, is that over-the-air casino advertising is either injurious

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9. The fact question presented here, namely, how can a regulatory scheme in which the same announcement is permitted to be broadcast on behalf of several parties but barred from being broadcast on behalf of others be acceptable under the First Amendment, but not the legal analysis, was raised at the oral argument in the court of appeals below.

to the public or it is not. It cannot be both injurious and not injurious at the same time. If a broadcaster is permitted to carry a commercial announcement saying "Play our slot machines" over the air on behalf of an Indian casino, it is presumably because that announcement is not injurious to the public. If that is the case, however, how can the same broadcaster's carriage of the same announcement, "Play our slot machines", on behalf of a state licensed casino ten minutes later be injurious to the public? The answer, we submit, is that it cannot be. The statutory scheme of § 1304, as amended, in which broadcasters are both permitted to and barred from carrying the same commercial announcement, is irrational. Whatever governmental purpose there may be behind this restriction cannot save it, because the selective nature of the restriction is self defeating.

The Government's selective restriction on casino advertising in § 1304, as amended, is irrational and as such violates the First Amendment rights of broadcasters. Under this analysis it would not appear necessary to reach the second, third and fourth parts of the Central Hudson test in order to find this scheme unconstitutional, because that determination can be made solely on the basis of the first part of Central Hudson, which is undisputed, and the selective nature of the restriction on the speech of broadcasters imposed by the Government here.

In short, a restriction on the commercial speech of broadcasters based not on the substance of what is said but on the identity of the person by whom or on whose behalf the message is spoken cannot be acceptable under the First Amendment, regardless of whatever governmental interest may underlie the restriction.

Respondents submit that the decision of the Ninth Circuit correctly applies the Central Hudson test to this case. However, if a conflict develops between the circuits over the application

of *Central Hudson* to § 1304, as amended, or if the Court otherwise decides to review the constitutional question in the *Greater New Orleans* case, respondents would like to be heard to defend the decision of the Ninth Circuit and to raise the threshold question presented here. For that reason the Court is requested to hold this case in abeyance pending the decision in *Greater New Orleans,* and to dispose of the two cases together.

CONCLUSION

As shown above, the procedural question raised by the Government, whether the court of appeals erred in failing to remand the case for the taking of further evidence under *Coors*, was not raised at the appropriate time below, and does not warrant review in any event. With respect to the constitutional question, which was not raised by the Government, the Court is respectfully requested to hold this case in abeyance pending a decision on the same question by the Fifth Circuit on remand in the *Greater New Orleans* case so that the two cases may be disposed of together.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
VALLEY BROADCASTING COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION OF NATIONAL ADVERTISERS, AND AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION OF NATIONAL ADVERTISERS, AND AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amici Curiae are associations of national and local broadcasters, advertisers, and advertising agencies.[1] They share a continuing commitment to preserving First Amendment protection for all forms of lawful speech, and have often appeared before the Court to urge broad

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.2. This brief was authored by counsel for *amici curiae*, and no person or entities other than *amici curiae* made a monetary contribution to the preparation and submission of this brief.

protection for commercial speech. *Amici* respond to the Government's petition for *certiorari* to address the Government's request for a remand of this case, which is based on an unprecedented theory. The Government seeks review only for the opportunity to provide additional evidence—evidence which, if it exists, should have been presented in support of the Government's motion for summary judgment filed more than five years ago. The result sought by the Government would impose an unwarranted burden not only on the federal courts but on all those, like *Amici* and their members, who vigorously participate in the commercial marketplace of ideas.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association of the nation's radio and television stations and networks, representing the American broadcasting industry. NAB has long been committed to the advancement of the freedom of America's broadcasters to transmit truthful commercial speech, to permit listeners and viewers to make informed and autonomous choices in the marketplace among lawful products and services.

The Association of National Advertisers ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of business to advertise its lawful services and products. With more than 5,000 subsidiaries, divisions, and operating units, ANA members market a wide array of goods and services and account for a majority of the nation's annual national and regional advertising expenditures. As this country's principal community of commercial speakers, ANA has long been committed to the advancement of truthful commercial speech in aid of the right of America's consumers to make well informed choices in the marketplace.

The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, represent more than 750 advertis-

ing agencies located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertising, as well as significant portions of local and regional advertising. More than 100 AAAA member agencies provide promotion, advertising, and other strategic marketing services to clients in the gaming industries, including state and Indian nation lottery and casino operators. AAAA is dedicated to advancing the interests of the advertising industry and has for many years represented its members in connection with resisting governmental efforts to restrict commercial free speech.

Amici and their members, as broadcasters, advertisers, and advertising agencies, therefore, have a substantial interest in the ability of all commercial lottery operators to engage in truthful and nonmisleading commercial speech about their lawful products.

REASONS THE PETITION SHOULD BE DENIED

The Government's Petition for a Writ of Certiorari ("Petition") is based on a fundamental misconception of constitutional law. The Court in its commercial speech cases—decided both before and after the District Court granted summary judgment in this case—has required the Government to bear a heavy evidentiary burden to justify speech restrictions. The Ninth Circuit found that these cases mandated the conclusion that the Government failed to carry that burden, particularly in light of the Court's decision in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), which is dispositive of this case.

Far from raising constitutional issues, the essence of the Government's Petition is a procedural argument that it should be entitled to multiple bites at the litigation apple if it becomes dissatisfied with the strategic decisions it made in the trial court. The Government should be treated no differently than any other litigant which, having the burden of proof, fails to produce sufficient evidence to carry that burden despite having ample opportunity to

do so. The Petition should be denied, or, in the alternative, the Court should grant the Petition and summarily affirm the decision below.

I. THE COURT'S INTERVENING COMMERCIAL SPEECH DECISIONS DO NOT JUSTIFY ALLOWING THE GOVERNMENT AN ADDITIONAL OPPORTUNITY TO PRESENT EVIDENCE.

The Government seeks a remand of this case for additional evidentiary inquiry purportedly because it was unfairly "surprised" by the evidentiary burden this Court has required of the Government in commercial speech cases decided since the District Court granted summary judgment. These cases, however, add nothing novel to the long-standing requirement that the Government produce evidence to support commercial speech bans. Since at least 1980, 13 years before the District Court's judgment, this Court has demanded that the Government carry a heavy evidentiary burden to justify restrictions on commercial speech. The Government's failure to do so here is attributable to an inherently contradictory statutory scheme and the irremediable lack of any evidentiary support—not, as the Government contends, a change in the law that denied it the opportunity to present necessary evidence. The Court should not further burden the lower courts and the litigants with the fruitless exercise of allowing the Government multiple opportunities to present evidence in support of a statute that cannot be justified.

A. The Ninth Circuit's Decision Is a Routine Application of This Court's Commercial Speech Inquiry.

The Court has evaluated government restrictions on commercial speech for almost 20 years using the four factors established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The Ninth Circuit based its decision in this case on the third part of the *Central Hudson* test, which requires the Government to prove that the restriction "directly advances the Governmental interest asserted." *Id.* at 564.

The Court continues to adhere to the same basic formulation of the third part of the test. In the more recent words of the Court:

> [I]n *Edenfield v. Fane*, we had occasion to *explain* the *Central Hudson* factor concerning whether the regulation of commercial speech "directly advances the governmental interest asserted." In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Rubin v. Coors Brewing Co., 514 U.S. 476, at 486 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, at 770-71 (1993)) (emphasis added).

Contrary to the Government's assertions, the Court's commercial speech decisions rendered since 1993, therefore, have reiterated and clarified, not substantially altered, the always heavy evidentiary burden required of the Government by *Central Hudson*—the same fundamental burden that applied when the District Court granted summary judgment against the Government in this case. Importantly, commercial speech cases decided prior to 1993 echo this Court's more recent descriptions of the *Central Hudson* test, and made the Government's constitutional burden abundantly clear in 1993. In *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), for example, a plurality of the Court concluded that the State's lack of "empirical evidence to support its claim" resulted in failure to carry "the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.* at 108-09 (plurality opinion of Stevens, J.). And in an observation that is equally ac-

curate today, the Court stated in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), that "'recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" *Id.* at 478 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)); *accord Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).[2] The Court's extant commercial speech jurisprudence thus made clear the showing required of the Government.

In any event, *Coors Brewing* unequivocally mandated the Ninth Circuit's decision. The Court in *Coors Brewing* unanimously struck down a statutory ban on disclosing alcohol content on beer labels—a statute riddled with exceptions that allowed disclosure of this banned information through advertising and that actually required disclosure of alcohol content on the labels of distilled spirits. The Court found this regulatory scheme "irrational," explaining that "[t]here is little chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effect." 115 S.Ct. 1585 at 1593.

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[2] *See also Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 at 340 (1986); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Metromedia v. San Diego*, 453 U.S. 490 (1981). Circuit court decisions in place in 1993 were equally clear in instructing the state and federal governments that they bear a heavy burden to justify commercial speech restrictions under the *Central Hudson* test. *See, e.g., Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *aff'd*, 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 946 F.2d 464 (6th Cir. 1991), *aff'd*, 507 U.S. 410 (1993); *Edge Broadcasting Co. v. United States*, 5 F.3d 59 (4th Cir. 1991), *rev'd*, 509 U.S. 418 (1993).

The Ninth Circuit properly found that 18 U.S.C. § 1304 and its exceptions are indistinguishable from the statutory scheme at issue in *Coors Brewing*. Section 1304 purports to prohibit broadcast advertising of *all* commercial lotteries, while Section 1307 allows such advertising when sponsored by a nonprofit or governmental organization, and 25 U.S.C. § 2720 exempts "any gaming conducted by an Indian tribe pursuant to [the Indian Gaming Regulatory Act]." The Ninth Circuit concluded, as this Court had in *Coors Brewing*, that "because section 1304 permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, *it is impossible for it materially to discourage public participation in commercial lotteries.*" 107 F.3d at 1335 (emphasis added).

This case, therefore, presents no new issues that would justify review by this Court. The Court's prior commercial speech decisions, particularly *Coors Brewing*, are dispositive of the issues presented, rendering unnecessary any decision the Court could make except summary affirmance.

B. The Government Could Not Have Reasonably Relied on *Posadas* to Justify Its Failure to Carry Its Burden of Proof.

The Government nevertheless attempts to create a constitutional—rather than a procedural—issue by contending that, despite overwhelming authority requiring evidentiary support, the Government offered no evidence on the impact of the statutory scheme in sole reliance on the Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). The Court in that case, according to the Government, "sustained the constitutionality of a similar restriction on gambling advertising . . ., and, in so doing, the Court had dismissed the significance of comparable statutory exceptions without any evidentiary inquiry." Petition at 21-22. The Government misinterprets the Court's decision in

Posadas, which failed to support the Government's actions in 1993 and cannot justify the Government's position now.

The statute and state interest at issue in *Posadas* were fundamentally different from the statutes and asserted interests presented here. The Puerto Rico statute (1) prohibited advertisements for casino gambling, (2) directed to residents of the Commonwealth, but (3) allowed local advertisements for other forms of gaming. The legislature's asserted interest underlying the statute was to reduce demand for casino gambling by Puerto Rico residents, and the Court concluded that allowing advertising for gambling *other* than casino gambling did not undermine this asserted interest. The Court, moreover, reached this conclusion, in part, as a matter of *fact*, based on *evidence* in the record of the distinction between casino gambling and other, more traditional kinds of gambling in Puerto Rico. *Id.* at 341-43.[3]

The federal statutes at issue here, in contrast, (1) prohibit *all* broadcasts of advertisements for *all* commercial lotteries (as defined in the statute, which includes casino gambling), (2) anywhere in the country, yet (3) expressly permit some of those same commercial lotteries (including casinos) to broadcast just such advertisements. As the Ninth Circuit correctly observed, the Government's stated innterest is to reduce public participation in *all commercial lotteries*, commensurate with the language of Section 1304. 107 F.3d at 1335. These statutes' broad sweep and internal and pervasive inconsistency stand in sharp contrast to the more narrow Puerto Rico statutes. The Court in *Posadas*, therefore, never addressed the issues raised in the plaintiff's challenge to the constitutionality of Section 1304, rendering patently unreasonable the Government's purported reliance on *Posadas* for the

[3] The Court further emphasized the intensely local nature of its ruling in *Posadas*, stressing the "unique cultural and legal history of Puerto Rico." *Id.* at 339 n.6.

unsupported proposition that no evidentiary inquiry was required in this case.

The Government's Petition and continuing reliance on *Posadas*, moreover, is a thinly veiled attempt to resuscitate the fully discredited "vice" exception to constitutional protection for commercial speech. The Government seeks the opportunity to present evidence to support its position that *any* reduction in the amount of advertising for gambling or other "vices" necessarily advances the Government's asserted interests. The Court, however, has already rejected that argument. Not only did the Court conclude in *Coors Brewing* that a statute cannot withstand *Central Hudson* scrutiny when it allows the same conduct the Government claims an interest in prohibiting, but the Court has expressly found that commercial speech concerning so-called "vices" is entitled to no less protection than commercial speech related to any other subject.[4] The Government, therefore, simply could not introduce any evidence —even if given the additional opportunity it seeks—that would rationalize the statutory scheme embodied by Section 1304 and its exceptions, much less justify it under the First Amendment.[5]

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[4] *Coors Brewing*, 514 U.S. at 487 n.2; *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 at 1522 (1996) (Stevens, J.). The Court in *44 Liquormart* also effectively overruled *Posadas*, a majority of the Justices finding that it no longer reflects the proper constitutional inquiry—at least as to part three ("direct and material advancement") and part four ("reasonable fit") of the four-part *Central Hudson* test. *44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J.), 116 S. Ct. at 1522 (O'Connor, J., concurring).

[5] Indeed, the Government has acknowledged in its Petition that it presented such additional evidence to the District Court in New Jersey, which nevertheless held the same statute unconstitutional. *See Players Int'l, Inc. v. United States*, No. 96-4911, Slip. Op. at 14 (D.N.J. Dec. 16, 1997), *cited in* Petition at 11 n.5 ("It is illogical to believe that non-FCC regulated gaming, including casino gambling, does not promote the same social ills caused by FCC regulated gaming. Congress, in creating the exceptions in § 1304 and its

The Court instructed the Government that it bears a heavy burden to justify bans on commercial speech long before it moved for summary judgment in this case. The Government has failed to carry that burden as to Section 1304. The Government is not entitled to another opportunity to present evidence, if it exists, that it should have presented to the District Court in 1993 and would not affect the constitutional analysis if it were presented now.

II. THE GOVERNMENT IS NOT ENTITLED TO MULTIPLE OPPORTUNITIES TO SATISFY ITS BURDEN OF PROOF TO CORRECT PERCEIVED ERRORS IN ITS CASE PRESENTATION.

While touting the need for compilation of an "adequate" factual record before the Court can determine the constitutionality of a statute, the Government fails to mention that the fault for any deficiency in the record falls squarely on the Government's shoulders. This Court has never held, as the Government contends, that the federal judiciary has an independent obligation, regardless of the actions of the parties, to review constitutional challenges to federal or state statutes to ensure that the parties create an "adequate" record. The Court has treated such cases as it treats all cases: the party with the burden of proof must submit sufficient evidence to carry that burden, and that party will not prevail if it fails to do so. Having failed to carry its burden with the evidence it presented to the District Court, the Government is not entitled to another opportunity simply because it now believes that additional evidence is necessary—particularly when the Government fails to specify any relevant (much less poten-

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corresponding rules, did not suggest that Native Americans, charities, states or government organizations cause different social ills from those caused by regulated gaming."); *id.* at 21 ("The exceptions allow the same activities the government believes cause significant public harm.").

tially persuasive) additional evidence that it would present if given another opportunity.

The Government principally relies on a misreading of the Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*"Turner I"*), to support its position. The issue in *Turner I* was the constitutionality of "must-carry" regulations that require cable television operators to transmit on their cable systems the over-the-air signals of local commercial and public broadcast stations. The cable television plaintiffs and the broadcast industry defendants filed motions for summary judgment, and the government filed a cross-motion to dismiss. "Although the Government had not asked for summary judgment, the District Court, in a divided opinion, granted summary judgment in favor of the Government . . ., ruling that the must-carry provisions are consistent with the First Amendment." *Id.* at 632. This Court vacated the District Court's grant of summary judgment and remanded the case for additional findings of fact, concluding that "because there are genuine issues of material fact still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government." *Id.* at 667-68; *see id.* at 668-69 (Blackmun, J., concurring); 669-74 (Stevens, J., concurring in part and concurring in the judgment).

Far from recognizing an independent judicial obligation to ensure an adequate record, the Court's decision in *Turner I* stands only for the unremarkable proposition that a party is not entitled to summary judgment when genuine issues of material fact remain to be resolved.[6] The Court

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[6] The other cases the Government cites also support this same proposition. *See Askew v. Hargrave*, 401 U.S. 476 (1971) (per curiam) (finding that plaintiff had failed to present sufficient evidence to support a motion for summary judgment after concluding that the case should be remanded on abstention grounds); *Storer v. Brown*, 415 U.S. 724, 738-39 (1974) (finding that the evidence submitted by the state was insufficient to support the District Court's decision).

further noted that such a conclusion is particularly appropriate when the Government had not filed its own motion for summary judgment and thus had no opportunity to provide evidence supporting its position. As Justice Blackmun observed, the Government was entitled to such an opportunity when the Government's evidence was "submitted to defeat a motion for summary judgment" but was "not adequate to support one." *Id.* at 668. Here, the Government had every opportunity to present evidence in support of its own motion for summary judgment, as well as in opposition to the plaintiffs' motions. The Government, however, made the strategic decision not to attempt to produce evidence concerning the operation of the statutory scheme in support of their affirmative motion for summary judgment. Nothing in *Turner I* supports the Government's request to be insulated from the results of that decision and given another opportunity to present evidence that, if it exists, should have been presented long ago.

Turner I, moreover, presented the Court with unique circumstances that are not present in this case. The Cable Television Consumer Protection and Competition Act of 1992 at issue in *Turner I* was the result of Congress' first comprehensive efforts to regulate the cable television industry, as opposed to over-the-air broadcast television that has long been subject to federal oversight. The principal issue in that case was the applicable constitutional standard that should apply to the plaintiffs' First Amendment challenges to the new law—the strict scrutiny applied to government restrictions on fully protected speech; intermediate scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech; or the standard historically applied to broadcast television. Once the proper level of scrutiny was determnied, the issue then became whether, and the extent to which, the "unusually detailed statutory findings" based on three years of Congressional hearings—only a portion of which had been pre-

sented to the District Court—satisfied the applicable constitutional inquiry. *Id.* at 663-67 (plurality op. of Kennedy, J.).

The restrictions on broadcast advertising of commercial lotteries, in sharp contrast to the 1992 must-carry regulations, have been in existence for many years, and are not supported by any statutory findings, much less the extensive Congressional record presented to the Court in *Turner I*. The constitutional scrutiny to be applied to those restrictions, moreover, was established by the Court almost 20 years ago in *Central Hudson*, not as a matter of first impression in this case. *See supra* at pages 4-7. The Court's remand decision in *Turner I*, therefore, provides no support for the Government's novel contention that a remand is appropriate simply to correct the Government's failure to present sufficient evidence when it had the opportunity to do so.

The Government's conduct further undermines its claimed entitlement to additional opportunities to present evidence. After the District Court found Section 1304 unconstitutional, the Government made no effort to seek a remand for additional evidentiary inquiry as this Court continued to render commercial speech decisions that were contrary to the Government's interpretation of its obligation to produce evidence.[7] The Ninth Circuit expressly requested additional briefing on the applicability of *Coors Brewing*, but the Government's responding brief merely attempted to distinguish that case without ever mentioning the need for a remand should the court find it dispositive. *See* Supplemental Brief for the Appellants (May 17, 1995). Only when the Ninth Circuit relied on *Coors*

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[7] *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. (1996); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v. Florida Dept. of Business & Professional Regulation*, 512 U.S. 136 (1994); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Brewing to affirm the District Court's grant of summary judgment against the Government did the Government first contend that the case should be remanded for additional evidentiary inquiry.[8] The Court should not accept such obviously self-serving, as well as meritless, excuses for the Government's failure to present evidence sufficient to satisfy the heavy burden to justify its commercial speech ban that this Court has consistently required.

This Court need not, and should not, do the work of the Attorney General as well as its own. The Government, by its own admission, made a strategic decision not to present evidence on the operation of Section 1304 and its exceptions. *See* Petition at 8. The Government made a second strategic decision not to seek a remand from the Ninth Circuit in response to that court's request for briefing on the effect of *Coors Brewing*—the very case the Government now claims to be a surprise. The Court should not now grant *certiorari* to review this case simply because the Government wants a third "bite at the apple" to avoid the results of its own strategic choices.

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[8] Indeed, the Government has forcefully advocated in those cases in which restrictions on free speech have been upheld that intervening commercial speech decisions by this Court do *not* entitle the *plaintiffs* to a remand for the opportunity to present evidence. *See* Brief for United States as *Amicus Curiae* dated July 17, 1996, in *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore,* on remand to the Fourth Circuit after this Court vacated the decision below at 63 F.3d 1318 (4th Cir. 1995). The Government thus apparently believes that additional evidentiary inquiries are appropriate only if they would benefit the Government.

CONCLUSION

For the foregoing reasons, the Government's Petition for Writ of Certiorari should be denied, or, in the alternative the Court should grant the Petition and summarily affirm the decision below.

Respectfully submitted,

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No. 97-1047

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

VALLEY BROADCASTING COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A federal court should not invalidate an Act of Congress on the basis of an incomplete evidentiary record that is inadequate to resolve the constitutional questions addressed by the court. The decision of the Ninth Circuit disregards this basic principle of constitutional adjudication. None of respondents' arguments suffices to excuse that error.

1. a. Respondents argue (Br. in Opp. 2-4) that the government is at fault for the absence of evidence regarding the statutory exceptions to 18 U.S.C. 1304.[1]

[1] We note that respondents themselves did not introduce evidence regarding the practical scope and operation of the statutory exceptions. Instead, they directed their evidentiary submissions to establishing that casino gambling is advertised in

As explained in our petition, however, the government had no reason to believe that such evidence was required when it undertook to defend this suit before the district court in 1992. At that time, this Court's decision in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986), strongly indicated that the existence of exceptions to a legislative restriction on commercial speech does not affect the constitutionality of the legislation under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). See Pet. 7-8, 21-22.[2]

Respondents assert (Br. in Opp. 3-4) that this Court's decision in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1984), should have put the government on notice that it was obligated to present record evidence regarding the scope and effect of Section 1304's exceptions. *Zauderer*, however, did not address the constitutional significance of exceptions to a restriction on commercial speech.[3] To the

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non-broadcast media such as newspapers and billboards. Although respondents did look to the statutory exceptions as one basis for their First Amendment challenge, they relied on the bare existence of the exceptions (see pp. 7-8 *infra*), rather than on evidence of the actual impact of the exceptions.

[2] Contrary to the suggestion of amici National Association of Broadcasters *et al.* (Amicus Br. 8), this Court's analysis of the "direct advancement" issue in *Posadas* in no way rested on any evidentiary showing by Puerto Rico regarding the effect of the advertising restriction in that case. See *Posadas*, 478 U.S. at 341-343.

[3] The decisions of this Court cited by amici to support their argument that the Ninth Circuit's reading of *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), did not represent a change in the law (Amicus Br. 5-6) also did not suggest that the government is required to make an evidentiary showing that a restric-

contrary, *Zauderer* involved what this Court characterized as a "blanket ban" on the use of illustrations in legal advertising. See 471 U.S. at 632, 648. The Court held that the "blanket ban" was unconstitutional precisely because of its "broad prophylactic" scope. *Id.* at 647-649.[4] Particularly in light of this Court's subsequent decision in *Posadas*, nothing in *Zauderer*—with its focus on overinclusiveness—can fairly be taken to have put the government on notice that the statutory exceptions to Section 1304 might make the statute impermissibly underinclusive.[5]

Alternatively, respondents argue (Br. in Opp. 2-3) that the government should have sought a remand for further evidentiary proceedings in 1995 when, at the direction of the Ninth Circuit, the parties filed

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tion on commercial speech is not undermined by statutory exceptions to the restriction. Only two of those decisions involved the significance of exceptions to a restriction, and in both cases, this Court upheld the challenged restriction without considering any evidence regarding the effect of the exceptions. See *Posadas*, 478 U.S. at 341-343; *Metromedia* v. *San Diego*, 453 U.S. 490, 508-512 (1981).

[4] *Zauderer*'s reference to the lack of "evidence," quoted by respondents (Br. in Opp. 4), is directed squarely at the regulation's overinclusiveness: "nowhere does the State cite any evidence or authority of any kind for its contention *that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban.*" 471 U.S. at 648 (emphasis added). Respondents omit the italicized language from their quotation.

[5] Indeed, as late as 1995, the Ninth Circuit itself held squarely that "'underinclusiveness' may be the basis of a First Amendment violation *only* when a regulation represents an 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *Moser* v. *FCC*, 46 F.3d 970, 974, cert. denied, 515 U.S. 1161 (1995) (emphasis added).

supplemental post-argument briefs regarding this Court's intervening decision in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). However, *Coors* did not purport to repudiate—indeed, did not even discuss—this Court's decision in *Posadas*. Neither did *Coors* question the continued authority of *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993), which held that "the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated" and that the government "[need not] make progress on every front before it can make progress on any front." *Id.* at 434. Indeed, as noted in our petition (Pet. 22 n.11), it remains highly questionable even today whether *Coors* sweeps as broadly as the Ninth Circuit now understands it.[6] The government therefore had no reason to urge the Ninth Circuit in 1995 that *Coors* required a remand for an evidentiary inquiry of the sort that this Court dispensed with in *Posadas*.

However one may characterize the state of the law after *Coors* was decided in 1995, the district court proceedings that generated the record in this case took place more than two years *before* the *Coors* decision. At that time, as explained above, there was no reason for the government to develop an evidentiary record regarding the scope and effect of the statutory exceptions to Section 1304. Subsequent events during the course of the appeal can hardly be deemed to render the government's reliance on *Posadas* in 1992 retroactively unjustified.

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[6] The Ninth Circuit itself gave *Coors* a relatively narrow reading in *Bland* v. *Fessler*, 88 F.3d 729, 739, cert. denied, 117 S. Ct. 513 (1996).

b. Respondents' arguments (Br. in Opp. 3-4) about the state of the law during the course of this litigation reflect a basic misapprehension about the grounds for the government's petition. The fact that, in finding a failure of proof, the Ninth Circuit relied on constitutional decisions of this Court that postdate the district court proceedings is, of course, an important consideration in favor of a remand. See, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 556, 559-560 (1941); *Jones* v. *City of Lubbock*, 640 F.2d 777, 777-778 (1981) (Goldberg, J., concurring), opinion supplemented on reh'g, 682 F.2d 504 (5th Cir. 1982); see also 28 U.S.C. 2106 (authorizing courts of appeals to "remand [a] cause and * * * require such further proceedings to be had as may be just under the circumstances"). However, the change in the law is by no means the only consideration. The case for an evidentiary remand also rests on the fundamental principle that "before * * * questions of constitutional law, both novel and of far-reaching importance, [are] passed upon" by appellate courts, "'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'" *Borden's Farm Prods. Co.* v. *Baldwin*, 293 U.S. 194, 212 (1934) (quoting *City of Hammond* v. *Schappi Bus Line, Inc.*, 275 U.S. 164, 171-172 (1927) (Brandeis, J.)).

That principle, rather than concern for fair notice, underlies this Court's decisions in cases such as *Askew* v. *Hargrave*, 401 U.S. 476 (1971) (per curiam), and *Storer* v. *Brown*, 415 U.S. 724 (1974). In *Askew* and *Storer*, the Court determined that the existing record was inadequate to resolve constitutional challenges to state laws and remanded for further evidentiary proceedings. See Pet. 15-16. In neither opinion is there any indication that the governing constitu-

tional standards had changed during the pendency of the appellate process or that the parties had otherwise lacked an adequate opportunity to present evidence bearing on those standards. Instead, the Court reasoned that "[when] the manner in which the [challenged] program operates may be critical in the decision of the [constitutional] claim, that claim should not be decided without fully developing the factual record at a hearing." *Askew*, 401 U.S. at 479; accord *Storer*, 415 U.S. at 738-740. That reasoning applies with even greater force here, where the record is insufficient as a result of an intervening change in the law. Tellingly, respondents do not even cite *Askew* or *Storer*.[7]

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[7] Amici mischaracterize (Amicus Br. 11 & n. 6) *Askew* and *Storer*, as well as *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) (*Turner I*), as standing for no more than the rule that summary judgment is not appropriate when a genuine issue of material fact remains unresolved. The Court's reasoning in *Askew* and *Storer*, however, is not based on principles of summary judgment but is based instead on the principle described above that constitutional issues should be decided only on a fully developed factual record. See *Askew*, 401 U.S. at 479; *Storer*, 415 U.S. at 738. Indeed, in *Askew* the only evidence before the district court was an affidavit submitted by the plaintiffs that merely verified the allegations of the complaint. Because the defendants had not submitted any evidence in response, there was no genuine issue of material fact under ordinary summary judgment principles. And the Court's opinion in *Storer* nowhere suggests that the case arose on a motion for summary judgment. Although *Turner I* did rest in part on the fact that the case came to the Court on summary judgment, the Court remanded for evidentiary proceedings not only because—as respondents (Br. in Opp. 10-12) and Amici (Amicus Br. 12) note—the government had not moved for summary judgment, but also because of the existence of "unresolved factual questions" and "the importance

2. Respondents suggest (Br. in Opp. 6-10) that an evidentiary remand is unnecessary because Section 1304's statutory exceptions render the statute inherently incapable of advancing the government's interests. The Ninth Circuit, however, thought otherwise. The court of appeals acknowledged that if the statutory exceptions to Section 1304 in practice result only in "limited" advertising, the exceptions would "*not* interfere with the government's interest" in protecting non-gambling states. Pet. App. 19a (emphasis added). The court of appeals thus explicitly recognized that an appropriate evidentiary showing would be sufficient to sustain the constitutionality of Section 1304. Respondents' theory that the statutory exceptions render Section 1304 facially unconstitutional, regardless of their actual impact, flies in the face of the Ninth Circuit's own reasoning.

Nothing about the statutory exceptions suggests that Section 1304 is incapable of satisfying the "direct advancement" component of the *Central Hudson* test. Respondents themselves acknowledge (Br. in Opp. 7) that Section 1304 prohibits all commercial casinos from broadcasting gambling advertisements on any television or radio station in the United States. As noted in our petition (Pet. 23), commercial casinos account for more than 40% of the nation's total gross gambling revenues. As this Court held in *Edge*, "the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated." 509 U.S. at 434. Given the size of the commercial casino industry, both in absolute and in relative terms, there is every

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of the [constitutional] issues." 512 U.S. at 668 (opinion of Kennedy, J.).

reason to believe that Section 1304 "substantially reduc[es]" gambling advertising, notwithstanding the existence of the statutory exceptions.[8]

Respondents argue (Br. in Opp. 6-10) that there is no rational basis for the government to prohibit broadcast gambling advertisements by commercial casinos but to allow Indian tribes, local governments, and charitable organizations to engage in advertising. That is obviously incorrect. Each of the statutory exceptions to Section 1304 was enacted after careful consideration by Congress of the interests to be served by the exceptions. Congress had a reasonable basis to believe that some of the exceptions, such as the exception for charitable organizations, were unlikely to result in widespread broadcast advertising because of the relatively limited scope of the underlying gambling activity. And Congress reasonably determined that other exceptions, such as those for governmental organizations and Indian tribes, directly serve countervailing social (and federalism) interests that are not advanced by commercial casinos. See Pet. 5-6. Those legislative judgments are eminently rational ones, and nothing in the commercial speech doctrine disables Congress from taking them into account in determining the appropriate contours of Section 1304.

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[8] Respondents note (Br. in Opp. 10) that *Players International, Inc.* v. *United States*, No. 96-4911, 1997 WL 780942 (D.N.J. Dec. 19, 1997), held Section 1304 to be unconstitutional despite the presentation of a more fully developed factual record by the government in that case. The government considers the district court's decision in *Players* to be incorrect, and that decision will be subject to appellate review in due course.

In addition to arguing that the particular exceptions to Section 1304 are irrational, respondents argue (Br. in Opp. 13-15) that it is inherently impermissible for the government to draw regulatory distinctions between entities that are engaged in the same kind of commercial speech. Respondents assert (*id.* at 15) that a commercial speech restriction "based * * * on the identity of the person by whom or on whose behalf the message is spoken cannot be acceptable under the First Amendment."

That assertion is squarely foreclosed by *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) (*Turner I*). In *Turner I*, this Court expressly rejected the proposition that "all regulations distinguishing between speakers warrant strict scrutiny" under the First Amendment. 512 U.S. at 657. Instead, the Court held that "speaker-based laws" are subject to strict scrutiny only "when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* at 658. Respondents do not suggest that Section 1304 is subject to strict scrutiny on that ground, nor could they.

3. Respondents invite the Court (Br. in Opp. 13) to hold the government's petition in abeyance pending resolution of the appellate proceedings in *Greater New Orleans Broadcasting Ass'n* v. *United States*, No. 94-30732 (5th Cir.), and the anticipated filing of a petition for certiorari in that case. It would be unusual for this Court to hold a petition for the resolution of a case still pending in another court of appeals, because it is impossible to predict when, if ever, the Court will receive a petition for certiorari in that case. Moreover, the petition in this case does not

seek the Court's review, on the present state of the record, of the underlying constitutional question that respondents expect to be decided and then presented to this Court in *Greater New Orleans*. For these reasons, we regard the disposition that we have urged to be more appropriate than respondents' suggestion that the petition be held pending resolution of *Greater New Orleans*. Nevertheless, we have no objection to that course if the Court considers it preferable to vacating the Ninth Circuit's decision at this time and remanding the case for further evidentiary proceedings.

* * * * *

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings. The Court may wish to consider summary disposition of the case for that purpose.

Respectfully submitted.

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